Supreme Court, U.S.
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No. 06-1085 FEB 1 - 2007

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In The
Supreme Court of the United States

ROBERT J. AYERS, JR., et al.,

Petitioners,

v.

DEANNA FREITAG,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964 supports a female prison guard's action for sexual harassment against a state prison when (a) the action is based on an allegedly hostile work environment caused by prisoners' lewd sexual misconduct, and (b) the guards are hired and trained to confront this sort of prisoner misconduct.

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are the California Department of Corrections and Rehabilitation, Robert Ayers, Theresa Schwartz, and Deanna Freitag.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF REASONS FOR GRANTING THE PETITION	7
REASONS FOR GRANTING THE PETITION	9
A. The Ninth Circuit's Decision Undermines the Application of *Oncale* and *Clark County* to Prisons by Holding Them to the Same Standards as Ordinary Businesses and Ignoring the Reality of Their Inherently Dangerous Work Environments	9
B. The Ninth Circuit's Decision Compromises the Federal Courts' Traditional Deference to Prison Administrators on Prisoner Discipline and Safety, under *Turner v. Safley*	13
CONCLUSION	18

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Barbour v. Browner, 181 F.3d 1342 (D.C. Cir. 1999)..... 10

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).....11

Cain v. Blackwell, 246 F.3d 758 (5th Cir. 2001).....11

Clark County School Dist. v. Breeden, 532 U.S. 268 (2001).....9, 10, 11, 12

Coleman v. Wilson, 912 F.Supp. 1282 (E.D. Cal. 1995)..... 16

Dothard v. Rawlinson, 433 U.S. 321 (1977).....8, 14, 15, 16

Everson v. Michigan Dept. of Corrections, 391 F.3d 737 (6th Cir. 2004)..... 13

Faragher v. Boca Raton, 524 U.S. 775 (1998) 10

Folkerson v. Circus Circus Enters., Inc., 107 F.3d 754 (9th Cir. 1997)..... 12

Madrid v. Gomez, 889 F.Supp. 1146 (N.D. Cal. 1995) 16

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1993) 9

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).....*passim*

Plata v. Schwarzenegger, 2005 U.S. Dist. LEXIS 43796 (N.D. Cal. October 3, 2005) 16

Pugh v. Locke, 406 F.Supp. 318 (M.D. Ala. 1976)..... 14

Randolph v. Ohio Department of Youth Services, 453 F.3d 724 (6th Cir. 2006).....11

Robino v. Iranon, 145 F.3d 1109 (9th Cir. 1998)..... 13

Slayton v. Ohio Department of Youth Services, 206 F.3d 669 (6th Cir. 2000)..... 12

TABLE OF AUTHORITIES – Continued

Page

Tharp v. Iowa Dept. of Corrections, 68 F.3d 223 (8th Cir. 1995) 14

Torres v. Wis. Dept. of Health and Social Services, 859 F.2d 1523 (7th Cir. 1988) 14

Turner v. Safley, 482 U.S. 78 (1987) 8, 13, 15, 17

STATE CASES

Lyle v. Warner Bros. Television Productions, 132 P.3d 211 (Cal. 2006) 11

STATUTES

28 United States Code
§ 1254(1) 1

42 United States Code
§ 2000e-2(a)(1) 9
§ 2000e-2(a)(2) 1
§ 2000e-2(e) 14

The California Department of Corrections and Rehabilitation, Robert Ayers, and Theresa Schwartz, petitioners, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case, after Petition for Rehearing/Rehearing En Banc, on November 3, 2006.

OPINION BELOW

The September 13, 2006 opinion of the United States Court of Appeals for the Ninth Circuit appears at Appendix, 39-74, and is reported at 463 F.3d 838. The November 3, 2006 order denying petitioners' petition for rehearing and rehearing en banc, and amended opinion appears at Appendix, 1-38, and is reported at 468 F.3d 528.

STATEMENT OF JURISDICTION

The original judgment of the court of appeals was entered on September 3, 2006, and the order and decision denying the petition for rehearing and rehearing en banc was entered on November 3, 2006. The jurisdiction of this Court applies pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 701(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(2), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

1. Pelican Bay State Prison is a maximum security prison located in the remote northwest corner of California. Pelican Bay comprises three facilities, a maximum security prison which in 1998-1999 confined approximately 2000 general population inmates, a small minimum security facility, and the Security Housing Unit ("SHU"), a special unit within the prison that confines approximately 1500 of the most dangerous and incorrigible inmates.

SHU inmates present the prison with serious, continuous management problems, committing a wide range of crimes and rules violations, constantly fabricating weapons used to assault staff and inmates, committing violent acts against inmates, staff, and prison property at Pelican Bay, and instigating violence at other prisons. SHU inmates commonly "act out," yelling or beating cell doors for an entire work shift, exposing themselves, threatening staff and inmates, "gassing" staff or other inmates, and "holding the pod hostage." An inmate gasses staff by throwing milk, water, urine or feces at the correctional officer. An inmate holds a pod hostage by refusing to return to his cell or by jerking handcuffs into his cell for use as a weapon on staff, causing all activity in the cell area to cease until the inmate is returned to his cell or the

weapon is recovered. There are many incorrigible inmates in SHU who urinate out the cell doors, throw feces, fight with staff every time they leave their cell, and physically hurt staff and themselves.

During a seven-month period in 2000, 2139 disciplinary offenses were reported by correctional officers at Pelican Bay, including 155 inmate assaults against staff, 101 deadly assaults by inmates against inmates, 243 reports of inmate possession of a deadly weapon or of materials for manufacture of such a weapon or explosive device, 77 instances of inmate indecent exposure, and 30 gassings. Reports of disciplinary offenses at Pelican Bay ranged from an average 400 to 750 per month in 1997 to an average of 250 to 300 per month as of 2000.

2. Deanna Freitag was employed as a correctional officer with the California Department of Corrections and Rehabilitation (CDCR) from September 1994 to June 2000. She started work at Pelican Bay on January 1, 1996, and in the Pelican Bay SHU in September 1998. Freitag's duties as a correctional officer were to maintain institutional security and inmate discipline, and supervise, monitor and control inmates. Correctional officers maintain staff and inmate security and inmate supervision using a variety of controls in response to inmate misconduct, including the inmate disciplinary process, physical restraints, revocation of privileges, and referrals for criminal prosecution. Freitag received training with respect to all aspects of her peace officer duties maintaining institutional security and inmate discipline. Specifically, she received training on inmate exhibitionist masturbation and how to respond to it as a correctional officer. The prison informed her that she would be exposed

to inmate exhibitionist masturbation in the course of her duties.

In the year that she worked in the SHU, Freitag witnessed a total of ten incidents of indecent exposure by three inmates. Pursuant to her duties, Freitag filed disciplinary reports against the inmates. Pelican Bay acted on those reports. The record shows that the prison disciplined two of the inmates – indeed, one was referred for criminal prosecution, prosecuted, convicted, and sentenced to an additional six years in state prison. The third inmate received six months of weekly counseling to curb his exhibitionist masturbation and other lewd behavior.[1]

3. On June 27, 2000, Freitag filed a complaint in the United States District Court for the Northern District of California. She alleged, inter alia, that the CDCR was liable under Title VII of the Civil Rights Act of 1964 for a sexually hostile work environment created by the Pelican Bay inmates. She sought compensatory damages and injunctive relief.

Defendant CDCR moved for summary judgment on the Title VII hostile environment claim, asserting that a prison guard cannot maintain an action for sexual harassment based on common sexual misconduct by inmates. The district court (Judge Thelton Henderson) denied the motion for summary judgment.

At trial plaintiff's expert in correctional management testified regarding a number of measures which, in his

[1] The Ninth Circuit decision contains detailed descriptions of the lewd conduct but not the discipline or counseling of the prisoners.

opinion, prison officials could have used at Pelican Bay in 1999-2000 to control inmate exhibitionist masturbation. These measures included: 1) progressive discipline, beginning with counseling inmates orally or in writing about indecent exposure to filing administrative disciplinary charges against the inmates; 2) assigning inmates escorts whenever they move from their cells; 3) revoking yard privileges; 4) shackling inmates while on the exercise yard; 5) videotaping inmates while they engage in indecent exposure; 6) applying lexan to cell fronts; 7) denying inmates opportunity to shower in upper tiers where there is greater visibility for exhibitionist masturbation; 8) applying mirrored film on the control booth windows; 9) meeting with the local District Attorney to encourage prosecution of inmate indecent exposure; 10) housing inmates who engage in indecent exposure in one unit without female correctional officers; and 11) counseling inmate exhibitionist masturbators. Plaintiff's expert, as well as state Inspector General investigators, opined that Pelican Bay had not responded appropriately to the concerns expressed by female officers about exhibitionist masturbation, and the institution had not taken adequate steps to correct the problem.

During the period that Freitag worked at Pelican Bay, however, prison officials did counsel, discipline, and refer for criminal prosecution, inmates who directed indecent exposure at Freitag. At trial, prison administrators explained that they considered, but rejected for reasons of institutional security, staff morale, or doubtful constitutionality, the suggestions to shackle inmates while in the exercise yard; apply lexan to cell fronts; apply mirrored film on control booth windows; and house inmates in units without female correctional officers.

At the close of evidence, the CDCR moved for judgment as a matter of law, asserting, again, that Title VII does not impose liability on a state prison for common sexual misconduct by inmates, which the court later denied.

On April 3, 2003, the jury found the CDCR liable under Title VII for a hostile working environment and awarded Freitag $500,000 in economic damages and $100,000 in non-economic damages. The CDCR again moved for judgment as a matter of law, asserting that Title VII does not impose liability on a state prison for prison inmate misconduct. The district court denied the motion.

On May 15, 2003, Freitag moved to amend the judgment to include permanent injunctive relief. With respect to Freitag's request that the court mandate specific measures to alleviate the problems related to the inmate conduct, the district court referred the matter to a special master with the authority to develop a remedial plan to address inmate indecent exposure and monitor the CDCR's compliance with the injunction.

The CDCR is currently subject to injunctive relief and a remedial plan developed by a court-appointed special master, monitored by the special master and plaintiff's counsel, and overseen by the district court. The injunctive relief authorizes the special master to mandate that the state prison implement a variety of measures to address inmate indecent exposure, including mandatory inmate discipline, mental health intervention, modification of prison facilities and equipment, training for all correctional staff, and promulgation and amendment of administrative regulations.

4. The Ninth Circuit affirmed the judgment. In the opinion (by Reinhardt, J., with Noonan & Hawkins, JJ.),

the court concluded that the inmates created a hostile environment by repeatedly exposing Freitag to lewd behavior and comments. When the CDCR argued that the court must consider the social context of a prison – an inherently harsh, dangerous environment in which prisoners' lewd behavior is common, and the guards are hired to control precisely this sort of misconduct – the court ruled that "even in an inherently dangerous working environment, the focus remains on whether the employer took reasonable measures to make the workplace as safe as possible." App., 19. The court held that the CDCR was liable for the prisoners' sexual harassment in the same manner that an ordinary business can be liable for harassment of its employees by third parties, such as casino patrons. App., 16. The Ninth Circuit further warned that a state prison may be liable for a hostile environment resulting from even a single instance of inmate misconduct directed at a correctional officer. App., 21. The Ninth Circuit also affirmed the injunctive relief, which subjects the CDCR to the remedial plan that was developed by the special master and that is monitored by the special master and plaintiff's counsel.

SUMMARY OF REASONS FOR GRANTING THE PETITION

1. The Ninth Circuit erroneously held that Title VII allows prison guards to maintain an action for a hostile work environment based on common prisoner misbehavior that the guards were hired and trained to confront. The court erred in two respects. First, contrary to this Court's teachings in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), which requires courts to examine the

social context of each case, the Ninth Circuit removed the inmates' behavior from the inherently harsh context of a prison and, instead, focused on the prisoners' words and conduct in isolation. As a result, the court held that Title VII imposes a duty on prisons to ensure that prisoners meet the same standards of civility as customers in an ordinary business, such as a restaurant or casino. Second, the court failed to determine whether the prisoners' conduct was so severe that it *altered* the terms and conditions of the guard's employment, as this Court requires. The inmates' misbehavior is part of the guard's work environment, and confronting it is part of the guard's job.

The Ninth Circuit's decision conflicts with *Oncale* and other decisions of this Court, and, if it stands, it effectively makes prisons liable for requiring guards to perform their jobs.

2. The Ninth Circuit's decision conflicts with decisions of this Court, conflicts with circuit court decisions, and compromises the traditional discretion of prison administrators over issues of inmate discipline and safety by using Title VII to impose minimal standards on prisoner conduct and to alter prison facilities. Under *Turner v. Safley*, 482 U.S. 78, 84-85 (1987), and *Dothard v. Rawlinson*, 433 U.S. 321 (1977), courts generally defer to prison administrators' judgments regarding inmate discipline and institutional security. Several circuits have deferred to prison administrators, citing *Turner*, in Title VII actions. The Ninth Circuit not only failed to grapple with *Turner* but also second-guessed the administrators' decisions on safety and prisoner discipline. It approved a court-appointed special master and a remedial plan that require

the prison to construct new facilities and alter the prison's procedures for inmate discipline. Under the Ninth Circuit's approach, Title VII effectively trumps prison officials' discretion on matters of safety and inmate discipline.

Prison officials in California – the nation's largest prison system – face enormous institutional challenges. The Court should clarify that Title VII does not require them to curb inmates' vulgar behavior at the expense of prison safety.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Decision Undermines the Application of *Oncale* and *Clark County* to Prisons by Holding Them to the Same Standards as Ordinary Businesses and Ignoring the Reality of Their Inherently Dangerous Work Environments.

Under Title VII of the Civil Rights Act of 1964, "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" because of the individual's sex, race, religion, color, and national origin. 42 U.S.C. § 2000e-2(a)(1). In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1993), this Court recognized that a hostile work environment can be sufficiently discriminatory to violate Title VII. At issue here is the application of two key requirements

for determining how Title VII applies in the harsh environment of a prison in which the guards are hired and trained to confront abusive sexual misconduct by prisoners.

First, Title VII is not one-size-fits-all. As this Court explained in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), courts must consider the social context in which the alleged harassment takes place – in particular, the expectations of the parties, their relationship, and the surrounding circumstances. *Oncale*, 523 U.S. at 82. Words or conduct that might be hostile and abusive in one context may be considered normal in another. A football coach does not sexually harass a football player "if the coach smacks him on the buttocks as he heads onto the field" because, in the context of a player-coach relationship, that sort of behavior is normal and expected. *Id.* It would be abusive, however, if the coach smacked his secretary's buttocks, given their relationship and the normal expectations of people that work in an office. *Id.*; *see Barbour v. Browner*, 181 F.3d 1342, 1348-49 (D.C. Cir. 1999) ("Barbour's protestation is like that of a waitress who complains that her customers are sometimes rude: treatment that would be objectionable in other contexts is an inevitable part of the job.").

Second, when examining the social context, the critical question is whether the "behavior is so objectively offensive as to alter the conditions of the victim's employment." *Oncale,* 523 U.S. at 1003. This Court has repeatedly insisted "that sexual harassment is actionable under Title VII only if it is so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment." *Clark County School Dist. v. Breeden*, 532 U.S. 268 (2001) (per curiam) (quotations omitted); *Faragher v. Boca Raton*, 524 U.S. 775, 786

(1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752 (1998) (Only conduct that is "severe and pervasive" can produce "constructive alterations in the terms and conditions of employment"); *Oncale*, *supra*, 523 U.S. at 81 (Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment").

In *Clark County*, the Court rejected a Title VII action by a school district employee who was offended by a vulgar statement in a job application. The Court observed, "The ordinary terms and conditions of respondent's job required her to review the sexually explicit statement in the course of screening job applicants." Though a tame example, *Clark County* illustrates the fact that employees in a variety of jobs – from police assigned to the vice squad to actors in R-rated movies – must routinely confront sexual language or sexual conduct. *Cf. Lyle v. Warner Bros. Television Productions*, 132 P.3d 211, 226 (Cal. 2006) (rejecting hostile environment claim based on crude sexual banter by writers of the adult-theme television program *Friends*). The question is not whether the employee is exposed to offensive language or behavior – which may simply be part of the job – but whether it is so severe and pervasive that it *alters* the terms and conditions of employment. *See Randolph v. Ohio Department of Youth Services*, 453 F.3d 724, 734 (6th Cir. 2006) (evaluating prisoner's sexual assault of kitchen staffer in context of hostile prison environment); *Cain v. Blackwell*, 246 F.3d 758, 760-61 (5th Cir. 2001) (rejecting hostile environment claim by nurse because crude sexual insults from Alzheimer's patients were part of the nurse's "daily routine," but suggesting that physical assaults may be actionable).

The Ninth Circuit's decision eviscerates the application of *Oncale* and *Clark County* to prisons and effectively

makes prisons liable under Title VII for requiring guards to perform their jobs. The court removed the inmates' behavior from its unique social context and, instead, focused on the prisoners' words and conduct in isolation: "Freitag was repeatedly exposed to conduct of a sexual nature. . . . witnessed inmates masturbating in an exhibitionist manner, oftentimes while they directed verbal taunts and crude remarks at her." App., 20. The court saw no distinction between the work environment of Pelican Bay State Prison and that of an ordinary commercial business, like a casino. App., 16 (citing *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754 (9th Cir. 1997)). Unlike customers in a casino, inmates at Pelican Bay commonly engage in lewd sexual misconduct, and, unlike casino employees, the guards expect the inmates to do so. The inmates' behavior did not alter the terms of Freitag's employment; she was hired and trained to deal with it.[2]

By failing to follow the teachings of *Oncale* and *Clark County*, the Ninth Circuit has put state prison officials in a quandary. The officials employ guards to control an inherently vulgar and hostile environment and to maintain minimal standards, but they may now be liable under Title VII for requiring the guards to do their jobs.

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[2] The court cited the Sixth Circuit's decision in a prison case, *Slayton v. Ohio Department of Youth Services*, 206 F.3d 669 (6th Cir. 2000). In dicta, the *Slayton* court said that prisons "cannot be held liable for a hostile work environment created by prison inmates. . . ," but then suggested an exception where the prison "fails to take appropriate steps to remedy" the inmates' behavior. The *Slayton* court made no attempt to reconcile these statements with *Oncale*. In any case, *Slayton* concerns a hostile environment created by a co-employee, a fellow guard who used inmates to torment the victim. *Id.* at 674 and 678.

B. The Ninth Circuit's Decision Compromises the Federal Courts' Traditional Deference to Prison Administrators on Prisoner Discipline and Safety, under *Turner v. Safley*.

1. The Ninth Circuit's use of Title VII to impose minimal standards on prisoner conduct and to alter prison facilities compromises the discretion of prison administrators regarding inmate discipline and safety. In *Turner v. Safley*, 482 U.S. 78, 84-85 (1987), this Court explained:

> The problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.

Under *Turner*, courts generally defer to prison administrators' judgments regarding inmate discipline and institutional security. *Id.* at 89.

Following *Turner*, several circuits have deferred to prison administrators in Title VII actions by prison guards who claim that prisons improperly discriminated when they hired only male or female guards. *Everson v. Michigan Dept. of Corrections*, 391 F.3d 737 (6th Cir. 2004) (upholding prison officials' decision to employ only female guards); *Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998)

(same); *Tharp v. Iowa Dept. of Corrections*, 68 F.3d 223 (8th Cir. 1995); *Torres v. Wis. Dept. of Health and Social Services*, 859 F.2d 1523 (7th Cir. 1988) (en banc). Title VII permits gender-based discrimination where sex "is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). The circuit courts deferred to the prison officials' judgment that safety considerations justified the discriminatory hiring practices.

These cases are consistent with this Court's decision in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), which predated the BFOQ exception. In *Dothard*, Alabama argued that the conditions in several of its prisons were so egregious that the State could legally refuse to hire female guards. *Id.* at 334. Indeed, a federal court had declared the prison conditions unconstitutional. *Id.* (*citing Pugh v. Locke*, 406 F.Supp. 318, 325 (M.D. Ala. 1976)). Notably, the danger to female guards was largely attributable to Alabama's prison administrators: because of "inadequate staff and facilities," the administrators made no attempt to segregate the inmates according to their level of dangerousness, "a procedure that, according to expert testimony, is essential to effective penological administration." *Id.* The Court noted that other States (including California) used effective measures that ensured adequate safety for female guards. *Id.* at 336 n. 23. Nevertheless, the Court agreed with the prison administrators that the conditions were unsafe for women guards. "In a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed

of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians." *Id.* at 335-36.

Although *Dothard* and the circuit court decisions concerned discriminatory hiring practices under Title VII, rather than a hostile work environment, they conflict with the decision below. First, whereas these courts deferred to the prison officials, the Ninth Circuit not only failed to grapple with *Turner* but also second-guessed the officials' decisions on safety and prisoner discipline. The Ninth Circuit believed, for example, that the prison should have installed semi-opaque film on control towers and cells, App., 21-22, despite prison officials' testimony that semi-opaque film would raise safety concerns. And although prison officials disciplined two of the three inmates cited in the Ninth Circuit's opinion – a fact not acknowledged in the opinion; indeed, one inmate received an additional *six years* of incarceration for his misbehavior – the Ninth Circuit deemed that the prison had failed to invoke the measures "sufficiently" and so upheld the jury's verdict. App., 22. Under the Ninth Circuit's approach, Title VII effectively trumps the discretion that *Turner* grants to prison officials on matters of safety and inmate discipline.

Second, the Ninth Circuit's use of Title VII as a prison reform statute conflicts with *Dothard*. The *Dothard* Court rejected the dissent's position that Title VII required Alabama officials to "take swift and sure punitive action against the inmate offenders" and to correct their "antisocial behavior patterns" so that the prisons are safe for women guards. *Dothard*, 433 U.S. at 346 (Marshall, J., concurring and dissenting). Instead, the Court accepted the egregious conditions of Alabama's prisons as it found them, notwithstanding the fact that the conditions were

largely caused by correctable problems like inadequate staff and facilities. *See Dothard*, 433 U.S. at 334-35. Here, however, the Ninth Circuit used Title VII to modify both the prisoners and the prison facilities, approving a special master to develop a court-imposed "remedial plan" to curb prisoners' antisocial behavior and to shield the guards from it. App., 14-15, 35-37.

Finally, the conflict between the BFOQ cases and this case undermines the fundamental purpose of Title VII. Jurisdictions like California that choose to provide employment opportunities for women guards in male prisons now face liability – and federal court oversight – for common prisoner misconduct. As the Ninth Circuit warned, even a single incident can suffice. App., 21. Thus, the decision below will encourage prison officials to limit their liability by hiring only male guards whenever they can invoke the BFOQ exception. Obviously, the whole point of Title VII is to prevent gender-based discrimination, not encourage it.

2. Although the decision governs only prisons within the Ninth Circuit, the Court should review this case rather than wait for other circuit courts to consider the issue further. The decision places California's prison officials in a difficult position. The prison system is presently operating under several federal court oversight decrees that require considerable investments of State resources for pressing, institutional problems. In *Coleman v. Wilson*, 912 F.Supp. 1282 (E.D. Cal. 1995) and *Madrid v. Gomez*, 889 F.Supp. 1146 (N.D. Cal. 1995), the district courts oversee ongoing remedial plans to improve inmates' physical and mental health services. In *Plata v. Schwarzenegger*, No. C01-1351; 2005 U.S. Dist. LEXIS 43796 (N.D. Cal. October 3, 2005), the district court appointed a

permanent receiver to manage the State prisons' health care delivery system and require its Department of Corrections to appropriate funds, dedicate personnel, and revise its procedures. With many demands and limited resources, prison officials need to know whether Title VII potentially imposes liability for inmates' lewd behavior. Indeed, following *Freitag*, female prison guards are pursuing a class action lawsuit under Title VII – in the same district court that decided the case at bar – alleging sexual harassment due to inmate misconduct at several prisons, *Berndt v. California Department of Corrections*, U.S.D.C., N.D., California, No. C03-3174 (N.D. Cal. filed July 9, 2003), thus raising the prospect that federal courts will eventually use Title VII to oversee inmate exhibitionism throughout the nation's largest state prison system.

To provide certainty for prison officials and courts, this Court should clarify that Title VII does not require prison officials to curb inmates' vulgar behavior at the expense of prison safety, nor does Title VII supercede the deference that courts grant to prison officials under *Turner*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: February 1, 2007

Respectfully submitted,

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468 F.3d 528

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEANNA L. FREITAG, *Plaintiff-Appellee*, v. ROBERT J. AYERS, JR.; TERESA SCHWARTZ; AUGUSTINE LOPEZ; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, *Defendants-Appellants*, and DAVID A. CARMICHAEL; G. RODMAN; PAUL DILLARD; BARRY O'NEILL; GEORGE NEOTTI, *Defendants.*	No. 03-16702 D.C. No. CV-00-02278-TEH

DEANNA L. FREITAG, *Plaintiff-Appellee*, v. ROBERT J. AYERS, JR.; TERESA SCHWARTZ; AUGUSTINE LOPEZ; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, *Defendants-Appellants*, and DAVID A. CARMICHAEL; G. RODMAN; PAUL DILLARD; BARRY O'NEILL; GEORGE NEOTTI, *Defendants.*	No. 03-17184 D.C. No. CV-00-02278-TEH

DEANNA L. FREITAG,
Plaintiff-Appellee,

v.

ROBERT J. AYERS, JR.; TERESA SCHWARTZ; AUGUSTINE LOPEZ; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Defendants-Appellants,

and

DAVID A. CARMICHAEL; G. RODMAN; PAUL DILLARD; BARRY O'NEILL; GEORGE NEOTTI,
Defendants.

No. 03-17398

D.C. No. CV-00-02278-TEH

ORDER AMENDING OPINION AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued March 15, 2006
Submitted September 13, 2006
San Francisco, California

Filed September 13, 2006
Amended November 3, 2006

Before: Stephen Reinhardt, John T. Noonan, and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Reinhardt

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Pamela Y. Price and John L. Burris, Oakland, California, and Charles Stephen Ralston, Berkeley, California, for the plaintiff-appellee.

ORDER

The opinion filed September 13, 2006, slip op. 11183, and appearing at 463 F.3d 838 (9th Cir. 2006), is hereby amended as follows:

1. At slip op. at 11205, line 4: insert "sufficiently" after "failed to invoke".

2. At slip op. at 11205, line 4: after the sentence ending with "in this case." insert the following footnote: The jury had before it evidence offered by the defendants regarding disciplinary measures taken, including a belated referral for criminal prosecution of a principal offender after Freitag had filed her formal complaint with the California Department of Fair Employment and Housing, and after she had sent two letters to State Senator Polanco that precipitated the investigation by the Inspector General. The belated referral, however, attempted to address the conduct of only one of the 20 inmates who were responsible for 56 incidents of exhibitionist masturbation in the security housing unit, as identified in the Inspector General's report. Moreover, the jury heard the Inspector General's findings that the "institution has stopped referring exhibitionist masturbation cases to the district attorney" and that "[c]ases that would be appropriate for prosecution are not referred."

3. At slip op. at 11208, line 2: after "Polanco," strike the rest of the sentence from line 2 to line 5, beginning with "and Schwartz temporarily" and ending with "complaints of inmate harassment." After "Polanco," on line 2, insert the following: "and Schwartz requested at least one IA investigation in the months after Freitag's complaints of sexual harassment."

With these amendments, the panel has voted to deny the petitions for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. The petitions for rehearing and rehearing en banc are DENIED. No further petitions for rehearing or rehearing en banc may be filed.

OPINION

REINHARDT, Circuit Judge:

May a state department of corrections be held liable for prison officials' failure to correct a hostile work environment that is the result of male prisoners' sexual harassment of female guards? We answer that question, "Yes."

The California Department of Corrections and Rehabilitation (CDCR) and three Pelican Bay State Prison (Pelican Bay) administrators appeal a judgment in favor of Deanna Freitag, a former correctional officer in the prison's Secure Housing Unit. Freitag alleged that the CDCR and Pelican Bay were delinquent in addressing the sexually hostile environment created by prison inmates – particularly in confronting the pervasive practice at Pelican Bay of inmate exhibitionist masturbation directed

at female officers – and that she was retaliated against and ultimately terminated due to her repeated complaints regarding the problem. A jury agreed, finding that the CDCR maintained a hostile work environment and retaliated against Freitag in violation of Title VII of the Civil Rights Act of 1964, and that the three administrators retaliated against her for engaging in constitutionally protected speech in violation of 42 U.S.C. § 1983. We conclude that substantial evidence supports the jury's verdict that the CDCR violated Freitag's rights under Title VII, but we remand her First Amendment claim to the district court for reconsideration in light of the Supreme Court's decision in *Garcetti v. Ceballos,* 126 S. Ct. 1951 (2006). As a result, we also remand the jury's damages award to the same extent. We affirm the district court's grant of injunctive relief, however.

I

In January 1996, Deanna Freitag transferred to Pelican Bay State Prison from Chuckwalla Valley State Prison, where she had been a correctional officer for several years, in order to be closer to her family. Pelican Bay, a maximum security prison in Crescent City, California, includes a Secure Housing Unit (SHU) which incarcerates many of the state's most violent criminals. Inmates in the SHU are subjected to harsher and more restrictive conditions than exist at any other prison in the state system.[1]

On September 12, 1998, Freitag was working a relief shift in the SHU control tower when she witnessed Inmate

[1] The material facts in this case are not in dispute.

X standing naked in the exercise yard masturbating. Freitag opened a prison pod door and directed Inmate X, over an intercom, to return to his cell, at which point he ripped a temperature gauge off the pod wall, screamed sexually derogatory obscenities, and threatened to kill her. Freitag was instructed by her direct supervisor not to document the incident, but she nevertheless completed a disciplinary report, or 115 Form, charging Inmate X with threatening a public official. Freitag reported several additional incidents of inmate exhibitionist masturbation in late 1998 in documents called "chronos," or 128 Forms, which are placed in inmates' central files but ordinarily do not form the basis for disciplinary action. In one instance, Freitag was working a meal shift in the SHU when an inmate ejaculated onto a tray she was clearing.

In early January 1999, Freitag accepted a permanent position in the SHU. Shortly thereafter, on January 6, she was in the SHU control tower when she witnessed Inmate Y openly masturbating in the prison yard. Freitag demanded that Inmate Y stop, but he refused; he continued to masturbate in view of the control tower for approximately thirty minutes until his yard shift ended. Freitag documented the incident in a 128 Form. On February 17, 1999, Inmate Z exited the upper tier shower room and, while looking at Freitag in the control tower, into which he had a direct view from the tier, masturbated while shouting her name and proclaiming that he was "coming inside" her. Freitag completed a 128 Form detailing the incident and attempted to discipline Inmate Z with ten days of escort status, which was approved by a supervising captain. However, Lieutenant David Carmichael discarded the 128 Form and informed Freitag that she could not place Inmate Z on escort status, explaining to her that she

was the only officer who had a problem with Inmate Z, and that "it's only sex."

On March 17, Inmate X again openly masturbated in the SHU yard while Freitag was on duty in the control tower. She submitted a 115 Form charging Inmate X with indecent exposure, to which he pled guilty, but he was not assessed good-time credit forfeiture as a result of the disciplinary proceeding because prison administrators delayed in processing the paperwork. Also on March 17, Freitag sent a memorandum to Barry O'Neill, Carmichael's supervisor, with a copy to Robert Ayers, the warden at Pelican Bay, complaining that her reports of inmate misbehavior were being "denied or thrown away," thus causing her "authority and discretion [to be] undermined." On March 18, she issued Inmate X another 115 Form for indecent exposure.

On April 7, 1999, Inmate X requested that Freitag open the shower door to allow him to return to his cell. When she did so, he pushed his towel into the doorway and, standing naked, masturbated in front of her until she and another correctional officer escorted him back to his cell. Freitag submitted a 115 Form charging Inmate X with indecent exposure, but the violation was subsequently changed by a supervisor to willful delay of a peace officer, a lower-level offense. Later that day, Freitag sent a letter to Teresa Schwartz, the associate warden in charge of the SHU, chronicling the conduct of Inmates X and Z, complaining that her supervisors were "procrastinating" in responding to the sexually abusive behavior, and recommending enforcement of the CDCR's policy of referring repeat offenders to the district attorney's office for prosecution. She also stated: "For the supervisors' calloused exchange of me, and other female staff, as a sexual favor

to gain [Inmate X's] cooperation, I should be recompensed for my injury."

On April 15, 1999, Freitag wrote a letter to Cal Terhune, the CDCR's director, in which she alleged that Inmate X was "causing a hostile worksite," that her "[s]upervisors have delayed responding and been reluctant to respond," and that "[t]here has been no support to prosecute [Inmate X] for his sexual attacks and harassment." Several days later, on April 23, Freitag was called to a meeting with Schwartz and O'Neill. At the meeting, Schwartz informed Freitag that she was being relieved of her duty in the SHU pending a psychiatric evaluation; Schwartz stated that the prison was taking the action in response to Freitag's "incoherent" memoranda regarding inmate harassment. Schwartz also threatened to terminate her. Freitag was permitted to return to the SHU only after the evaluation deemed her fit for duty.

On July 7, the day after Freitag returned to the SHU, she witnessed Inmate Y masturbating in the yard. She submitted a 115 Form charging him with indecent exposure, but her supervisors declined her recommendation that he be disciplined with escort status. On July 15, Freitag wrote another memorandum to Ayers requesting that officers in the SHU receive additional training on how to manage inmates with behavioral problems. She detailed an incident that occurred the day before in which Inmate Y refused to be handcuffed by two correctional officers, one of whom allegedly responded by slamming the cuff port door on the prisoner's hands.

On July 26, Pelican Bay initiated an internal affairs (IA) investigation of Freitag. The investigation was initiated by Ayers and arose from purported factual inaccuracies

in Freitag's memorandum regarding the July 14 incident involving Inmate Y. On August 6, Ayers initiated another IA investigation of Freitag's allegations that her supervisors were destroying her disciplinary reports. The request submitted by Ayers alleged that Freitag had made "slanderous accusations against other staff."

On August 11, 1999, Freitag filed a formal complaint with the California Department of Fair Employment and Housing (DFEH). She alleged that she had been sexually harassed by Pelican Bay inmates, that she complained about the harassment to supervisors Glen Rodman, Carmichael, Schwartz, Ayers, and Terhune, that "my employer did not take the proper steps to address my complaint," and that in retaliation for her complaints she was threatened by Schwartz with termination and temporarily relieved of duty in the SHU. Augustine Lopez, the prison's Equal Employment Opportunity Coordinator, prepared the institution's response, which concluded that Freitag's allegations were unsubstantiated. As part of his investigation, Lopez interviewed Ayers and several other Pelican Bay administrators, but he acknowledges that he later destroyed the notes from those interviews.

On August 17, 1999, Freitag sent a letter to California State Senator Richard Polanco in which she alleged that she and other female correctional officers were regularly subjected to sexually abusive behavior in the SHU and that supervisors failed to respond adequately to her complaints regarding the inmate conduct. She also claimed that her disciplinary reports either were ignored completely or were not acted upon in sufficient time to permit the disciplining of inmates. She sent a second letter to Polanco dated September 24, 1999, with a copy to Terhune, in which she further described the mistreatment

that she received from Pelican Bay inmates and staff. In October, Polanco contacted the California Office of the Inspector General (IG), a state agency that oversees the CDCR, and requested that it initiate an investigation of the allegations in Freitag's letters. The IG sent several investigators, including Senior Deputy Inspector General Richard Ramsdell, to Pelican Bay; from November to December 1999, they interviewed dozens of prison inmates and employees, including Freitag, reviewed the inmates' central files, and contacted the Del Norte County District Attorney's Office regarding the referral of indecent exposure complaints from the prison. Freitag also exchanged letters with Ramsdell during the investigation.

The IG published a report of its investigation on July 11, 2000. The findings were uniformly and pointedly damning: The agency determined that (1) inmates in the SHU "regularly subject female correctional officers to lewd exhibitionism and exhibitionist masturbation"; (2) "supervisors and top administrative staff at Pelican Bay have not responded appropriately to complaints about inmates directing exhibitionist masturbation toward female staff members and have made little effort to take advantage of the options available to control exhibitionist masturbation behavior"; (3) "the security housing unit is not effectively using the prison disciplinary process and available legal sanctions in handling exhibitionist masturbation cases"; (4) Pelican Bay had "stopped referring exhibitionist masturbation cases to the district attorney"; and (5) Warden Ayers had taken "no definitive actions . . . to address exhibitionist masturbation directed at female correctional officers by male inmates." The IG also reported that Lopez informed one state investigator that

"[t]he reason the inmates hit on [the female correctional officers] is that they're a bunch of lesbians."

In addition to the two IA investigations of her initiated by Ayers in July and August 1999, Freitag was targeted by at least two more investigations following her DFEH complaint and letters to Polanco. On September 15, 1999, Ayers requested an IA investigation regarding Freitag's purported improper use of state resources, such as copy machines and telephones, for the purpose of pursuing her complaints. On October 22, Correctional Captain Paul Dillard sent Ayers a memorandum recommending that IA investigate allegedly false claims by Freitag that a correctional officer contaminated an inmate's food in May of that year. Freitag was formally interviewed regarding the latter charge on November 19, 1999.

On January 13, 2000, while the IG's investigation was being conducted, Schwartz sent Freitag a preliminary notice of adverse action stemming from the IA investigation into Freitag's report of the July 14, 1999, incident involving Inmate Y. Ayers recommended that Freitag be suspended for five days as a result of the investigation's determination that she falsified facts in her written memorandum describing the incident. On February 8, while the agency investigation was still in progress, Schwartz sent a second notice of adverse action, this time arising out of the prison's finding that Freitag made false accusations regarding her fellow officer contaminating the inmate's food. As a result of the findings of the two IA investigations, Freitag was terminated shortly before the Office of the Inspector General issued its report. Freitag then initiated an administrative appeal of her termination before the California State Personnel Board. As far as the

record before us reveals, the administrative appeal was still pending at the time the parties filed their briefs with this court.

II

Freitag filed her initial complaint in the district court on June 27, 2000. She alleged that (1) the CDCR is liable under Title VII of the Civil Rights Act of 1964 for sexual harassment pursuant to a hostile work environment theory; (2) the CDCR is liable under Title VII for retaliation; (3) Ayers, Schwartz, Carmichael, Rodman, Dillard, O'Neill, George Neotti,[2] and Lopez are liable under 42 U.S.C. § 1983 for violating various of her constitutional rights; and (4) all of the defendants are liable under 42 U.S.C. § 1985 for conspiring to violate her constitutional rights. Freitag sought compensatory and punitive damages as well as injunctive relief.

On March 25, 2002, the district court granted in part and denied in part the defendants' motion for summary judgment. It denied the motion with respect to the following claims: (1) the Title VII hostile work environment claim against the CDCR, (2) the Title VII retaliation claim against the CDCR based upon adverse employment actions not including Freitag's termination, and (3) the § 1983 claim that the individual defendants retaliated against Freitag in violation of her First Amendment rights. A jury trial commenced in March 2003. Freitag and several of her fellow female correctional officers testified regarding the sexually abusive environment in the SHU and the lack of an adequate institutional response.

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[2] Neotti was Pelican Bay's employee relations officer.

Freitag's expert on prison administration, William Katsaris, testified that Pelican Bay was "the only institution I have come across that has a serious problem with [exhibitionist masturbation]." He stated that prisons throughout the country have controlled the problem in part by installing semi-opaque finish to control booth windows so that officers can see out but inmates cannot see in.[3] He further testified that Pelican Bay administrators could have taken, but failed to take, other corrective actions such as imposing serious disciplinary measures for sexual misconduct, restraining sexually abusive inmates or taking away their yard privileges, and working with the district attorney's office to prosecute serious and repeat offenders. In addition, the IG's report was admitted into evidence over the defendants' objection, and Ramsdell testified extensively regarding the agency's investigation into Freitag's complaints and the prison's failure to take the requisite corrective actions.

The jury returned a unanimous verdict on April 3, 2003. It found the CDCR liable under Title VII for sexual harassment and retaliation, and Ayers, Schwartz, and Lopez liable under § 1983 for retaliation in violation of Freitag's First Amendment rights. It awarded Freitag $500,000 in economic damages and $100,000 in non-economic damages, and $100 in punitive damages against each Ayers, Schwartz, and Lopez. The verdict form did not require the jury to determine how much each defendant

[3] Pelican Bay did install opaque material on SHU cell doors, which prevented officers from viewing celled inmates from the waist down, but it did not do so until late 2000 or early 2001, after Freitag was terminated. Further, it did not install the material on control booth windows and thus did not address the problem of inmates masturbating in the prison yard knowing that female correctional officers are on duty.

was liable for on each claim – it found the CDCR and Ayers, Schwartz, and Lopez jointly and severally liable for the entire amount of compensatory damages.

On May 15, 2003, Freitag moved to amend the judgment to include permanent injunctive relief. The district court granted her motion in part, finding that "this Court has the authority to fashion an injunction that benefits not only Plaintiff, but all female correctional officers and other staff members at Pelican Bay who have been or may be harmed by CDC's unlawful conduct." The court entered the following permanent injunction:

> The California Department of Corrections,[4] its agents, officers, successors in office, employees and all persons acting in concert or participating with the department are permanently enjoined from engaging in any employment practices, or taking any other personnel action, for the purpose or with the effect of maintaining a sexually hostile work environment at Pelican Bay State Prison, or otherwise discriminating against any Pelican Bay State Prison employee on the basis of sex. The California Department of Corrections, its agents, officers, successors in office, employees and all persons acting in concert or participating with the department are further enjoined from engaging in any employment practices, or taking any other personnel action, for the purpose or with the effect of retaliating against any Pelican Bay State Prison employee for complaining

[4] At the time the district court granted injunctive relief, the agency was called the California Department of Corrections. In May 2005, it reorganized and changed its name to the California Department of Corrections and Rehabilitation.

> about, or otherwise opposing, practices made unlawful by Title VII.

The district court denied Freitag's request that the court mandate specific measures to alleviate the problems she raised, opting instead to refer the matter to a special master with the authority to monitor compliance with the injunction and to develop a remedial plan. The court also awarded Freitag attorneys' fees.

The CDCR, Ayers, Schwartz, and Lopez appealed, raising the following arguments: (1) the CDCR cannot as a matter of law be liable under Title VII for a hostile work environment created by inmates and, even if it could be liable, substantial evidence does not support the jury's verdict of liability in this case; (2) substantial evidence does not support the jury's verdict that the CDCR is liable for retaliation under Title VII; (3) substantial evidence does not support the verdict against Ayers, Schwartz, and Lopez; (4) the award of compensatory and punitive damages is not supported by substantial evidence; and (5) the district court abused its discretion in granting injunctive relief.

III

We review a district court's conclusions of law *de novo*. *See Tritchler v. County of Lake*, 358 F.3d 1150, 1154 (9th Cir. 2004). A jury's verdict, including a damages award, must be upheld if supported by "substantial evidence." *See Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). The district court's grant of injunctive relief is reviewed for an abuse of discretion and for the application of correct legal principles. *See Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1079 (9th Cir. 2004).

IV

Hostile Work Environment

We first address the CDCR's contention that it cannot, as a matter of law, be liable under Title VII for maintaining a hostile work environment caused by inmate misconduct. The contention is unsupported by the entire weight of case authority in this circuit and others, and we are compelled to reject it.

In the Ninth Circuit, employers are liable for harassing conduct by non-employees "where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct." *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 756 (9th Cir. 1997); *see also Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 968 (9th Cir. 2002). In recognizing that employers may be liable for third-party conduct, we, along with several other circuits, *see, e.g., Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 811-12 (7th Cir. 2001); *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1244 (10th Cir. 2001); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111 (8th Cir. 1997), have relied in part upon a regulation of the Equal Employment Opportunity Commission that provides that employers may be held liable for the acts of non-employees where the employer "knows or should have known of the conduct and fails to take immediate and appropriate corrective action." 29 C.F.R. § 1604.11(e). This theory of liability is grounded not in the harassing act itself – i.e., inmate misconduct – but rather in the employer's "negligence and ratification" of the harassment through its failure to take appropriate and reasonable responsive action. *See Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir. 2005).

Notwithstanding the clarity of our law on this point, the defendants request that we become the first court in the country to carve out an exception to Title VII whereby prisons, due to their distinctive character and problems, and in particular their "inherently hostile environment," are immune from lawsuits by correctional officers arising from sexual harassment by inmates. In support of this position, the defendants cite several cases in which federal courts have treated prisons differently in the context of civil rights claims. For example, in *Slayton v. Ohio Department of Youth Services,* 206 F.3d 669, 677 (6th Cir. 2000), in which a female correctional officer at a juvenile detention center alleged that the institution maintained a sexually hostile work environment caused in large part by inmate misconduct, the Sixth Circuit noted:

> Prisoners, by definition, have breached prevailing societal norms in fundamentally corrosive ways. By choosing to work in a prison, corrections personnel have acknowledged and accepted the probability they will face inappropriate and socially deviant behavior.

Nevertheless, the *Slayton* court upheld a jury verdict in favor of the plaintiff, ruling that, although allegations of inmate misconduct alone cannot support a hostile work environment claim, "this general rule against prison liability for inmate conduct does not apply when the institution fails to take appropriate steps to remedy or prevent illegal inmate behavior." *Id.*

The defendants also cite the following language from *Powell v. Morris,* 37 F. Supp. 2d 1011, 1017 (S.D. Ohio 1999):

> The propensity of courts to decline imposing liability for prisoner acts is based on solid logical and practical foundations: anyone who works at a prison . . . must expect some off-color interactions. . . . It is absurd to expect that a prison can actually stop all obscene comments and conduct from its inmates – people who have been deemed unsuited to live in normal society.

However, the defendants neglect to cite the very next sentence of the *Powell* opinion: "The most we can expect and require prisons to do is to implement and enforce policies reasonably calculated to minimize such harassment and protect the safety of its employees." *Id.* The defendants also cited *Powell* in the district court but there too failed to include the abovementioned sentence, an act the district judge characterized as "illustrative of Defendants' tendency to mischaracterize the relevant case law." Notably, although the defendants cite *Powell* in support of their argument that "Title VII does not impose liability on a prison employer for a hostile work environment caused by inmates under a negligence theory of direct liability," they fail to refer to a passage in the opinion that is far more pertinent to the present case: "Courts have repeatedly declined to impose sexual harassment liability upon correctional institutions for the sexually offensive conduct of inmates, *as long as the defendant institution took proper preventative and remedial steps with regard to inmate behavior.*" *Id.* (emphasis added).

In short, the defendants cite no authority, and we have found none, holding that prisons are uniquely exempt from liability for sexual harassment under Title VII, nor have they proffered any evidence that Congress intended prison employers to be thus exempt. Further, we see no persuasive argument, legal or otherwise, to support

the novel position that the defendants take on this issue. Nothing in the law suggests that prison officials may ignore sexually hostile conduct and refrain from taking corrective actions that would safeguard the rights of the victims, whether they be guards or inmates. As the district court found, "even in an inherently dangerous working environment, the focus remains on whether the employer took reasonable measures to make the workplace as safe as possible." The CDCR is not, by simple virtue of its status as a correctional institution, immune under Title VII from a legal obligation to take such measures and to protect its employees to the extent possible from inmate sexual abuse.

The next question is whether substantial evidence supports the jury's finding that the CDCR is liable for maintaining a hostile work environment in this case. A plaintiff asserting a Title VII claim under a hostile work environment theory must show (1) the existence of a hostile work environment to which the plaintiff was subjected, and (2) that the employer is liable for the harassment that caused the hostile environment to exist. *See Little,* 301 F.3d at 966 (citing *Faragher v. City of Boca Raton,* 524 U.S. 775, 787-89 (1998)). To establish the existence of a hostile work environment, "a plaintiff must prove that (1) she was subjected to verbal or physical conduct of a sexual nature, (2) this conduct was unwelcome, and (3) this conduct was sufficiently severe or pervasive to alter the conditions of . . . employment and create an abusive working environment." *Id.* (internal quotations omitted). The third element requires us to consider the totality of the circumstances and whether the harassment was both objectively and subjectively abusive. *Id.* With respect to the question of liability for harassment

caused by a third party, the employer's corrective measures must be "reasonably calculated to end the harassment"; the reasonableness of the corrective action will depend on, *inter alia,* the employer's ability to stop the harassment and the promptness of the response. *See Ellison v. Brady,* 924 F.2d 872, 882 (9th Cir. 1991) (internal quotations omitted); *see also Galdamez,* 415 F.3d at 1024.

The jury found that Freitag was subjected to a hostile work environment due to inmate sexual misconduct, and that the CDCR was liable because it failed to take prompt and effective remedial action reasonably calculated to address the misconduct. We conclude with little difficulty that substantial evidence supports each finding. With respect to the finding that Freitag was subjected to a hostile employment environment: First, there is sufficient evidence that Freitag was repeatedly exposed to conduct of a sexual nature. The jury heard testimony and reviewed exhibits that established that Freitag witnessed inmates masturbating in an exhibitionist manner, oftentimes while they directed verbal taunts and crude remarks at her. Second, the defendants' argument to the contrary notwithstanding, there was substantial evidence that Freitag did not welcome the sexually abusive conduct merely by accepting a job in the SHU. Although it certainly would have been reasonable for Freitag to anticipate substantial inmate misbehavior, given the severity of the crimes committed by those incarcerated at Pelican Bay, *see Slayton,* 206 F.3d at 677, she also had reason to expect that prison officials would seek in good faith to control the most extreme forms of sexual misconduct. In any event, contemplating some difficulties is a far cry from *welcoming* a constant barrage of sexual abuse that, according to the

testimony at trial, was allowed to continue virtually unfettered for the duration of Freitag's employment at the prison. Third, substantial evidence supports the jury's finding that the exhibitionist masturbation was sufficiently severe or pervasive to constitute abuse. On this point, the defendants argue that, following Freitag's April 7, 1999 memorandum to Schwartz, which they characterize as her first complaint to prison administrators, she "witnessed only three incidents of inmate masturbation." Even accepting the defendants' argument that the CDCR did not know about such behavior until April 7, 1999, a single incident of severe abuse can constitute a hostile work environment. *See Little,* 301 F.3d at 967 (citing *Clark County Sch. Dist. v. Breeden,* 532 U.S. 268 (2001)). More important, however, the defendants' time line misrepresents the record – it ignores Freitag's March 17, 1999 memorandum to O'Neill and Ayers in which she complained that her disciplinary reports on inmate sexual misconduct were being ignored. The defendants' tally thus does not account for the March 18 and April 7 incidents in which Freitag was exposed to exhibitionist masturbation. We find no basis to overturn the jury's determination on this issue.

The jury's second principal finding – that the CDCR failed to take prompt, corrective, and reasonable action to address the issue of inmate sexual misconduct – is also supported by substantial evidence. The jury heard testimony on this question from, among others, Katsaris, who testified that Pelican Bay is the only institution he has encountered with such a pervasive problem of inmate sexual misconduct. He testified regarding the corrective measures that other prisons have undertaken but that Pelican Bay had to that point ignored, including installing

semi-opaque film on control towers and cells and imposing serious disciplinary measures on repeat offenders. The jury also had before it the IG's report,[5] which enumerated the agency's findings that, among other things, the administrative staff at Pelican Bay had not responded appropriately to the concerns expressed by female officers about exhibitionist masturbation, and the institution had not taken adequate steps to correct the problem. The defendants' own brief acknowledges that "[t]he correctional staff controls inmates primarily by the inmate disciplinary process, physical restraints, revocation of privileges, and referral for criminal prosecution," all measures the evidence shows it failed to invoke sufficiently in this case.[6]

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[5] The district court did not err in admitting the IG's report into evidence at trial. Under the hearsay exceptions for business records, FED. R. EVID. 803(6), and public records, *id.* 803(8), the report was afforded a presumption of reliability and trustworthiness that the defendants failed to rebut. *See Gilbrook v. City of Westminster,* 177 F.3d 839, 858 (9th Cir. 1999). Specifically, Rule 803(8) allows the admission of reports of public agencies "setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." FED. R. EVID. 803(8); *see also Johnson v. City of Pleasanton,* 982 F.2d 350, 352 (9th Cir. 1992) (holding that, under Rule 803(8), reports of public agencies shall be admitted where the challenging party fails to meet its burden to show untrustworthiness). The defendants had a fair opportunity to challenge the reliability of the report through their cross-examination of Ramsdell. The district court did not abuse its discretion in finding the report reliable.

[6] The jury had before it evidence offered by the defendants regarding disciplinary measures taken, including a belated referral for criminal prosecution of a principal offender after Freitag had filed her formal complaint with the California Department of Fair Employment and Housing, and after she had sent two letters to State Senator Polanco that precipitated the investigation by the Inspector General. The belated referral, however, attempted to address the conduct of only one of the 20 inmates who were responsible for 56 incidents of exhibitionist masturbation in the security housing unit, as identified in the

(Continued on following page)

Accordingly, there was more than enough evidence to support the jury's finding that the prison failed to respond adequately or reasonably to the sexual abuse directed at Freitag and other female correctional officers.

For these reasons, we affirm the jury's verdict that the CDCR may be, and is in this case, liable under Title VII for maintaining a hostile work environment at Pelican Bay.

Title VII Retaliation

The defendants urge that substantial evidence does not support the jury's finding that the CDCR is liable under Title VII for retaliating against Freitag. A plaintiff may meet his burden of proof for a claim of retaliation under Title VII by showing, by a preponderance of the evidence, (1) involvement in protected activity opposing an unlawful employment practice, (2) an adverse employment action, and (3) a causal link between the protected activity and the adverse action. *See Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 252-53 (1981) (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)). With respect to the first element, "opposition clause protection will be accorded whenever the opposition is based on a *reasonable belief* that the employer has engaged in an unlawful employment practice." *Moyo v. Gomez,* 40 F.3d 982, 984 (9th Cir. 1994) (internal quotes omitted) (emphasis in original).

Inspector General's report. Moreover, the jury heard the Inspector General's findings that the "institution has stopped referring exhibitionist masturbation cases to the district attorney" and that "[c]ases that would be appropriate for prosecution are not referred."

The defendants make two related arguments as to CDCR retaliation. First, they contend that Freitag's belief that she opposed an unlawful employment action was unreasonable because "Title VII proscribes neither harassment by prison inmates nor a prison's failure to take adequate steps to address the harassment." That argument is foreclosed by our analysis in the previous section, which requires no repetition here. Second, the defendants argue that "[a]n employer cannot engage in unlawful retaliation if it does not know the employee has opposed or is opposing a violation of Title VII." To the extent that their contention is that they did not know Freitag was opposing unlawful sexual harassment, it is belied by (1) Freitag's April 7, 1999 memorandum to Schwartz, which stated that she should be "recompensed" for the injury she suffered due to the inmate misconduct she described and the prison's failure to respond; (2) her April 15, 1999, memorandum to Terhune, which alleged that the prison was doing nothing to address the "hostile worksite" created by inmate exhibitionist masturbation; and (3) her filing of a formal complaint with DFEH in August 1999 specifically alleging retaliation and harassment based upon her sex. To the extent that the defendants argue that they did not understand that the facts Freitag alleged regarding their failure to respond to the problems constituted a violation of Title VII, their argument is also without merit. The dispositive question is not whether the administrators at Pelican Bay believed that their failure to correct the complained of conditions constituted a violation of Title VII, but rather (1) whether they were aware that Freitag had "opposed" that failure and (2) whether Freitag's belief that their conduct was unlawful was reasonable. *See Burdine,* 450 U.S. at 252-53. Notwithstanding the defendants' erroneous opinion of the law, they

had the requisite knowledge regarding Freitag's complaints. As Freitag points out in her brief, "the inability of the defendants to grasp the mandate of Title VII, particularly in light of the clear language of 29 C.F.R. 1604.11, [] did not give them carte blanche to retaliate against [her] just because she evidently understood the law better than they did."

Because the defendants raise no meritorious challenge to the jury's finding that the CDCR is liable under Title VII for retaliating against Freitag, we affirm the verdict on this claim.[7]

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[7] On June 22, 2006, the defendants submitted a letter pursuant to Federal Rule of Appellate Procedure 28(j) in which they request that we consider the Supreme Court's recent decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006). They argue that *Burlington* rejected the Ninth Circuit's definition of what constitutes an adverse employment action and, accordingly, that we must reverse the Title VII retaliation verdict because the jury was not instructed that the employment actions must be considered adverse by a *reasonable* employee. *See Burlington*, 126 S. Ct. at 2415. We conclude that any instructional error was harmless. The instruction given to the jury stated that an adverse action "is defined as any action that is reasonably likely to deter the plaintiff or others from engaging in protected activity." The instruction, if erroneous, was harmless because the jury almost certainly would have found that the adverse employment actions it considered with respect to Freitag's Title VII claim – her temporary removal from duty in the SHU, the psychiatric evaluation, and the internal affairs investigations – would be considered materially adverse by a reasonable employee. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 805 (9th Cir. 2001) (holding that an instructional error in a civil case requires reversal only where the error is not "more probably than not harmless").

First Amendment Retaliation

The jury found that Ayers, Schwartz, and Lopez retaliated against Freitag in violation of her First Amendment rights. On appeal, the defendants challenge the jury's finding with respect to each element required to establish a First Amendment claim against a public employer: (1) The employee engaged in constitutionally protected speech, (2) the employer took adverse employment action against the employee, and (3) the employee's speech was a "substantial or motivating" factor in the adverse action. *See Coszalter v. City of Salem,* 320 F.3d 968, 973 (9th Cir. 2003). There can be no serious dispute that substantial evidence supports the jury's findings that the second and third elements were met with respect to Ayers and Schwartz.[8] Ayers initiated several IA investigations of Freitag shortly after she contacted Polanco, and Schwartz requested at least one IA investigation in the months after Freitag's complaints of sexual harassment. Both also approved her suspension and termination,[9] and there was sufficient evidence from which the jury could

[8] There is no evidence that Lopez is liable for retaliation under § 1983 because there is no evidence that he was responsible for, participated in, or even had knowledge of, any adverse employment action taken against Freitag. He did not contribute to the decision to relieve Freitag from her duty in the SHU, to refer her for psychiatric evaluation, to initiate the internal affairs investigations, or to terminate her. Thus, we reverse the jury verdict with respect to Lopez.

[9] The defendants argue that the district court's grant of summary judgment to the CDCR on Freitag's termination claim under Title VII necessarily barred consideration of her claim for termination under § 1983. That argument is foreclosed by our precedent. *See Allen v. Iranon,* 283 F.3d 1070, 1074 (9th Cir. 2002) (rejecting the defendants' attempt to import a Title VII standard in a § 1983 case because "the Title VII [burden-shifting] formula . . . allocates burdens of proof more favorably to defendants").

have inferred that Freitag's speech was a substantial or motivating factor in these adverse actions. *See Coszalter,* 320 F.3d at 977 (holding that a proximity in time of between three and eight months could support an inference of retaliation). However, because the Supreme Court's recent decision in *Garcetti v. Ceballos,* 126 S. Ct. 1951 (2006), modified prior First Amendment jurisprudence with respect to the first element – employee protected speech – we remand Freitag's § 1983 claim to the district court for reconsideration in light of that decision.[10]

In *Ceballos,* the Supreme Court considered whether an internal memorandum written by a deputy district attorney to his supervisors regarding what he believed to be misconduct in an investigation was protected speech under the First Amendment. 126 S. Ct. at 1955-57. It concluded that, under *Connick v. Myers,* 461 U.S. 138, 147 (1983), the issue is not only whether the speech in question addresses a matter of public concern, but also whether it is made *as a citizen. See id.* at 1956 (citing *Connick,* 461 U.S. at 146-47). The Court then determined that Ceballos did *not* speak as a citizen when he wrote the memorandum and thus did not engage in constitutionally protected speech, holding:

> The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. That consideration – the fact that Ceballos spoke as a prosecutor fulfilling his responsibility to advise his supervisor about how best to proceed with a pending case – distinguishes Ceballos' case from those in which the

[10] Subsequent to the issuance of *Ceballos,* we requested supplemental briefs from the parties addressing its effect on this case.

> First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Id. at 1959-60 (internal citations omitted). Ceballos's First Amendment claim failed because, "[w]hen he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee" as opposed to a citizen for purposes of the First Amendment. *Id.* at 1960.

The Court in *Ceballos* relied in large part upon its ruling in *Pickering v. Board of Education,* 391 U.S. 563 (1968). It considered the case a "useful starting point" in its First Amendment analysis, and the speech at issue in *Pickering* a material contrast to that in the case before it. 126 S. Ct. at 1957. In *Pickering,* a school teacher wrote a letter to a local newspaper criticizing the school board's allocation of financial resources and the district superintendent's alleged attempt to prevent teachers from opposing a proposed school bond. 391 U.S. at 566. The teacher was subsequently dismissed and he sued, claiming that the letter was protected by the First Amendment. *Id.* at 567. The Supreme Court agreed, ruling that the teacher did not, by accepting his job, "relinquish the First Amendment rights [he] would otherwise enjoy as [a] citizen[] to comment on matters of public interest." *Id.* at 568. In addition, the Court noted that teachers are

> the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be

> able to speak out freely on such questions without fear of retaliatory dismissal.

Id. at 572.

We are confronted with two issues: (1) whether the jury was instructed to consider only speech that, in light of *Ceballos,* is protected under the First Amendment, and (2) whether, if the jury was permitted to consider speech that is not protected, the instruction was harmless. With respect to the first issue, the jury was instructed in pertinent part as follows:

> Examples of speech protected by the First Amendment include:
>
> (a) Reporting sexually hostile inmate conduct to agents of the California Department of Corrections, either formally or informally;
>
> (b) Documenting Pelican Bay State Prison's responses or failures to respond to Plaintiff's reports of sexually hostile inmate conduct;
>
> (c) Informing Cal Terhune, Director of the California Department of Corrections, of either the inmates' sexually hostile conduct or of Pelican Bay State Prison's responses or failures to respond;
>
> (d) Informing State Senator Richard Polanco either of sexually hostile conduct or of the Pelican Bay State Prison's responses or failures to respond;
>
> (e) Reporting either the sexually hostile conduct or Pelican Bay State Prison's responses or failures to respond to the Office of the Inspector General; or

> (f) Cooperation with the investigation conducted by the Office of the Inspector General.

The defendants proffer two arguments why, in view of *Ceballos,* this instruction is erroneous and requires us to reverse the jury's verdict with respect to the § 1983 claim. First, they assert that Freitag did not in any instance speak "as a citizen" for purposes of constitutional analysis. Second, they contend that Freitag's speech did not address a matter of public concern. We disagree with respect to items (d), (e), and (f) – Freitag's letters to Senator Polanco and her written and oral communications with the Inspector General – all of which is related to the sexual abuse that she and other female correctional officers suffered at Pelican Bay. We think it clear that these communications are protected under the First Amendment.

With respect to the defendants' first argument, *Pickering* and *Ceballos* require the conclusion that Freitag acted as a citizen when she wrote letters to Senator Polanco and communicated with the Inspector General regarding her complaints of sexual harassment. Her right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee. *See Pickering,* 391 U.S. at 568. Indeed, these particular communications undoubtedly "bore similarities to letters submitted by numerous citizens every day." *Ceballos,* 126 S. Ct. at 1960 (citing *Pickering*). Under *Ceballos,* Freitag does not lose her right to speak as a citizen simply because she initiated the communications while at work or because they concerned the subject matter of her employment. *Id.* at 1959. The critical inquiry is instead whether Freitag engaged in the relevant speech "pursuant to [her] official duties." 126 S. Ct. at 1960. With

respect to her contact with Senator Polanco and the IG, the answer is "No."[11] It was certainly not part of her official tasks to complain to the Senator or the IG about the state's failure to perform its duties properly, and specifically its failure to take corrective action to eliminate sexual harassment in its workplace. Rather, it was Freitag's responsibility *as a citizen* to expose such official malfeasance to broader scrutiny. Accordingly, in these instances, for purposes of the First Amendment she spoke as a citizen.

As to the defendants' second argument that Freitag's complaints did not address a matter of public concern, we strongly disagree. Her assertions that inmates at Pelican Bay engaged in sexually abusive behavior with respect to the female guards while the prison's administrators failed to take appropriate corrective measures is "relevan[t] to the public's evaluation of the performance of governmental agencies." *Coszalter,* 320 F.3d at 973-74. Notably, several female correctional officers, including Freitag, testified at trial that the hostile work environment at Pelican Bay made it very difficult for them to perform their duties, and Katsaris testified that, in such circumstances, the prison's authority over its inmates is significantly eroded. Further, although the proper administration of our prisons generally is undoubtedly of great public interest, the specific allegations in this case address a matter of acute concern to the entire community. A vast majority of our state's

[11] We note that one IA investigation of Freitag arose from her purported improper use of state resources while on the job. That the defendants considered Freitag's use of copy machines and telephones to complain to outsiders about the harassment to which she was subjected improper and outside the scope of her employment is further evidence that her complaints were not made pursuant to her official duties.

prisoners will reenter the general population some day, some sooner than others.[12] It certainly would be of grave concern if those inmates were being released into our neighborhoods from an environment in which the State of California condoned sexually abusive behavior and the harassment of women.

For these reasons, we hold that Freitag's communications with Senator Polanco and the California Inspector General constitute constitutionally protected speech. However, under the district court's instruction, those were not the only communications the jury was entitled to consider in determining whether Ayers and Schwartz retaliated against Freitag in violation of her First Amendment rights. The relevant jury instruction also listed, as examples of protected speech, Freitag's internal reports of inmate sexual misconduct and documentation of the prison's failure to respond, as well as her communications with Terhune, the director of the CDCR. To the extent that the jury may have considered internal forms prepared by Freitag, it is clear that, under *Ceballos,* such activity is *not* constitutionally protected. For purposes of First Amendment analysis, Freitag submitted those reports pursuant to her official duties as a correctional officer and thus not in her capacity as a citizen. Whether Freitag's April 15, 1999 letter to Terhune is protected under the First Amendment is a closer question. We are unsure whether prison guards are expected to air complaints regarding the conditions in their prisons all the way up to the Director of the CDCR at the state capitol in

[12] The record is unclear as to whether any specific inmate who Freitag alleges contributed directly to the sexually hostile work environment has been released.

Sacramento. We are not aware, for example, what the union contract provides with respect to the persons to whom such grievances may or must be presented. The district court, having presided over this and related litigation for several years, may be in a better position to make the relevant factual determinations and, accordingly, we remand to it the issue of whether the Terhune letter is covered by the First Amendment.

Because the relevant instruction permitted the jury to consider, along with speech that we hold to be constitutionally protected, at least some unprotected speech as well, we remand Freitag's § 1983 claim to the district court for reconsideration. On remand, the district court shall make two determinations: (1) whether the Terhune letter constitutes protected speech, and (2) whether the jury instruction, which included as examples of protected speech either two or three items of unprotected speech, was more probably than not harmless. *See Swinton,* 270 F.3d at 805. In other words, is it more likely than not that the jury verdict was not affected by the erroneous inclusion of the two or three examples of unprotected speech? Given the district judge's expertise and his familiarity with the facts in the lengthy trial over which he presided, we think that he is best equipped to answer these questions in the first instance.

Damages

The defendants also challenge the jury's damages award, arguing that it is not supported by substantial evidence. The jury heard testimony from two expert witnesses regarding the economic damages that Freitag suffered as a result of the harassment and retaliation

inflicted upon her by the CDCR and Pelican Bay prison administrators, as well as testimony from her treating psychiatrist regarding non-economic damages resulting from the same. The jury determined that, as a result of the harassment and the various retaliatory acts by the defendants, including the internal affairs investigations that eventually led to Freitag's termination, and the termination itself, she suffered $500,000 in economic damages. It also found that, as a result of the defendants' actions, she suffered $100,000 in non-economic damages.

The special verdict form did not require the jury to determine how much each defendant is liable for under each claim. Instead, the jury found all four appellants – the CDCR, Ayers, Schwartz, and Lopez (whom we have ordered dismissed) – jointly and severally liable for the entire $600,000 in compensatory damages. The defendants do not challenge on appeal the fact that the jury held them jointly and severally liable for the entire award. They argue only that the amount is not supported by substantial evidence.

Assuming that the jury's findings as to all of the various claims were to stand, we would have no difficulty holding that the total sum awarded was supported by substantial evidence. We are left in a difficult position *vis-á-vis* the damages award, however, because although we affirm the jury's verdict with respect to Freitag's Title VII claims, we are remanding her § 1983 claim. We do not wish to speculate whether the entire amount of compensatory damages would be justified if only Freitag's Title VII claims remained following the district court's reconsideration on remand, or what effect a modification of the verdict as to the § 1983 claim might have on the amount to be awarded. We prefer to leave that question to the district

court for its initial review, if such review is necessary after it has addressed the harmless error question we have asked it to consider with respect to the § 1983 claim. Thus, we remand the jury's damages award with instructions to reconsider, if necessary, whether the $600,000 award of compensatory damages remains valid. *See Maynard v. City of San Jose,* 37 F.3d 1396, 1406 (9th Cir. 1994). Because the award of $100 in punitive damages against each Ayers and Schwartz was in connection with the § 1983 claim, we remand that award for reconsideration, if necessary, as well. In addition, because the district court may wish to reconsider the extent to which Freitag remains a prevailing party after it determines what, if any, adjustments it must make with respect to liability and damages, we also remand the issue of attorneys' fees for reconsideration, if necessary.

Injunctive Relief

The defendants assert that the district court abused its discretion in granting permanent injunctive relief. The sole contention in support of their argument is that Freitag no longer works for the CDCR and thus cannot benefit from the injunction.

The defendants cite only *Rau v. Apple-Rio Management Company, Inc.,* 85 F. Supp. 2d 1344 (N.D. Ga. 1999), in which the district court granted a plaintiff limited injunctive relief following a favorable jury verdict on her Title VII claims. The court did not grant the plaintiff's request that her employer remove documents from her personnel file in part because she was no longer an employee, despite the fact that she opined that she could be reinstated if successful in a separate claim for constructive

discharge. *Rau,* 85 F. Supp. 2d at 1351 n.4. The defendants urge that Freitag's re-employment with the CDCR is similarly "speculative," and thus that injunctive relief on her behalf is not appropriate.

Without endorsing the Georgia district court decision, we acknowledge that Freitag's reinstatement to employment with the CDCR is not certain. Nevertheless, when the district court issued its injunction, Freitag was still in the process of pursuing her state administrative appeal in which she maintains that she is entitled to retain her position as a correctional officer at Pelican Bay. Our decision in *Nanty v. Barrows Co.,* 660 F.2d 1327 (9th Cir. 1981) (overruled on other grounds, *O'Day v. McDonnell Douglas Helicopter Co.,* 79 F.3d 756 (9th Cir. 1996)), is pertinent. In *Nanty,* we held that a Native American truck driver was unlawfully discriminated against under Title VII when a company failed to hire him because of his race. 660 F.2d at 1332. Although we remanded Nanty's request for an injunction requiring the company to hire him because the record was not clear whether it would have given him the job absent its discriminatory actions, we held that he nevertheless was entitled to an injunction prohibiting the company from discriminating on the basis of race in its future hiring. *Id.* at 1333. We affirmed the injunction in part because the question whether the plaintiff was entitled to the job he sought had not been finally resolved and, thus, he retained a personal interest in ensuring that the company's discriminatory activity be enjoined. *See id.*

In California, permanent state employees possess a property interest in their job, guaranteed by statute, with attendant due process rights in their continued employment. *See Skelly v. State Personnel Bd.,* 539 P.2d 774, 784

(Cal. 1975). That interest and the attendant rights are not lost upon termination but continue post-termination pending the final resolution of the administrative proceeding before the Personnel Board. *See id.* at 789; *see also* CAL. GOV'T CODE §§ 19575-78. The administrative process that will determine whether Freitag remains entitled to her job with the CDCR is pending, and thus her property interest and due process rights have not been extinguished. More important, at the time the district court issued the injunction, Freitag possessed a property interest in her job and thus possessed a sufficient connection to her employment with the prison to support the issuance of an injunction in her favor. We conclude, as did the district court, that she has standing to seek an injunction affecting the employment practices of the CDCR.

V

There was overwhelming evidence presented to the jury that the CDCR maintained a hostile work environment at Pelican Bay by failing to take prompt and reasonable corrective action with respect to Freitag's multiple complaints regarding inmate exhibitionist masturbation directed at her and other female correctional officers. There was also overwhelming evidence that agents of the CDCR retaliated against Freitag as a result of those complaints. For these reasons, we affirm the jury's verdict with respect to the CDCR's liability under Title VII. However, due to an intervening Supreme Court decision, we remand for reconsideration of the jury's finding that Freitag's superiors retaliated against her in violation of her First Amendment rights in light of the instructional error regarding constitutionally protected speech. In this connection, we direct the district court to determine

whether such error was harmless. Accordingly, we remand the damages award and attorneys' fees award as well. Because of insufficiency of the evidence, we reverse the § 1983 judgment against Lopez. Finally, we affirm the district court's grant of injunctive relief.

AFFIRMED IN PART, REVERSED IN PART, REMANDED IN PART.

463 F.3d 838

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEANNA L. FREITAG,
Plaintiff-Appellee,
v.
ROBERT J. AYERS, JR.; TERESA SCHWARTZ; AUGUSTINE LOPEZ; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Defendants-Appellants.
and
DAVID A. CARMICHAEL; G. RODMAN; PAUL DILLARD; BARRY O'NEILL; GEORGE NEOTTI,
Defendants.

No. 03-16702
D.C. No.
CV-00-02278-TEH

DEANNA L. FREITAG,
Plaintiff-Appellee,
v.
ROBERT J. AYERS, JR.; TERESA SCHWARTZ; AUGUSTINE LOPEZ; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Defendants-Appellants.
and
DAVID A. CARMICHAEL; G. RODMAN; PAUL DILLARD; BARRY O'NEILL; GEORGE NEOTTI,
Defendants.

No. 03-17184
D.C. No.
CV-00-02278-TEH

DEANNA L. FREITAG,

Plaintiff-Appellee,

v.

ROBERT J. AYERS, JR.; TERESA SCHWARTZ; AUGUSTINE LOPEZ; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Defendants-Appellants.

and

DAVID A. CARMICHAEL; G. RODMAN; PAUL DILLARD; BARRY O'NEILL; GEORGE NEOTTI,

Defendants.

No. 03-17398

D.C. No. CV-00-02278-TEH

OPINION

Appeal from the United States District Court for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued March 15, 2006
Submitted September 13, 2006
San Francisco, California

Filed September 13, 2006

Before: Stephen Reinhardt, John T. Noonan, and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Reinhardt

COUNSEL

Jacob A. Appelsmith, Senior Assistant Attorney General, Vincent J. Scally, Supervising Deputy Attorney General, and Bill Lockyer, Attorney General, Sacramento, California, for the defendants-appellants.

Pamela Y. Price and John L. Burris, Oakland, California, and Charles Stephen Ralston, Berkeley, California, for the plaintiff-appellee.

OPINION

REINHARDT, Circuit Judge:

May a state department of corrections be held liable for prison officials' failure to correct a hostile work environment that is the result of male prisoners' sexual harassment of female guards? We answer that question, "Yes."

The California Department of Corrections and Rehabilitation (CDCR) and three Pelican Bay State Prison (Pelican Bay) administrators appeal a judgment in favor of Deanna Freitag, a former correctional officer in the prison's Secure Housing Unit. Freitag alleged that the CDCR and Pelican Bay were delinquent in addressing the sexually hostile environment created by prison inmates – particularly in confronting the pervasive practice at Pelican Bay of inmate exhibitionist masturbation directed at female officers – and that she was retaliated against and ultimately terminated due to her repeated complaints regarding the problem. A jury agreed, finding that the CDCR maintained a hostile work environment and retaliated against Freitag in violation of Title VII of the Civil Rights Act of 1964, and that the three administrators retaliated against her for engaging in constitutionally protected speech in violation of 42 U.S.C. § 1983. We conclude that substantial evidence supports the jury's verdict that the CDCR violated Freitag's rights under Title VII, but we remand her First Amendment claim to the district court for reconsideration in light of the Supreme Court's decision in *Garcetti v. Ceballos*, 126 S.Ct. 1951

(2006). As a result, we also remand the jury's damages award to the same extent. We affirm the district court's grant of injunctive relief, however.

I

In January 1996, Deanna Freitag transferred to Pelican Bay State Prison from Chuckwalla Valley State Prison, where she had been a correctional officer for several years, in order to be closer to her family. Pelican Bay, a maximum security prison in Crescent City, California, includes a Secure Housing Unit (SHU) which incarcerates many of the state's most violent criminals. Inmates in the SHU are subjected to harsher and more restrictive conditions than exist at any other prison in the state system.[1]

On September 12, 1998, Freitag was working a relief shift in the SHU control tower when she witnessed Inmate X standing naked in the exercise yard masturbating. Freitag opened a prison pod door and directed Inmate X, over an intercom, to return to his cell, at which point he ripped a temperature gauge off the pod wall, screamed sexually derogatory obscenities, and threatened to kill her. Freitag was instructed by her direct supervisor not to document the incident, but she nevertheless completed a disciplinary report, or 115 Form, charging Inmate X with threatening a public official. Freitag reported several additional incidents of inmate exhibitionist masturbation in late 1998 in documents called "chronos," or 128 Forms, which are placed in inmates' central files but ordinarily do not form the basis for disciplinary action. In one instance,

[1] The material facts in this case are not in dispute.

Freitag was working a meal shift in the SHU when an inmate ejaculated onto a tray she was clearing.

In early January 1999, Freitag accepted a permanent position in the SHU. Shortly thereafter, on January 6, she was in the SHU control tower when she witnessed Inmate Y openly masturbating in the prison yard. Freitag demanded that Inmate Y stop, but he refused; he continued to masturbate in view of the control tower for approximately thirty minutes until his yard shift ended. Freitag documented the incident in a 128 Form. On February 17, 1999, Inmate Z exited the upper tier shower room and, while looking at Freitag in the control tower, into which he had a direct view from the tier, masturbated while shouting her name and proclaiming that he was "coming inside" her. Freitag completed a 128 Form detailing the incident and attempted to discipline Inmate Z with ten days of escort status, which was approved by a supervising captain. However, Lieutenant David Carmichael discarded the 128 Form and informed Freitag that she could not place Inmate Z on escort status, explaining to her that she was the only officer who had a problem with Inmate Z, and that "it's only sex."

On March 17, Inmate X again openly masturbated in the SHU yard while Freitag was on duty in the control tower. She submitted a 115 Form charging Inmate X with indecent exposure, to which he pled guilty, but he was not assessed good-time credit forfeiture as a result of the disciplinary proceeding because prison administrators delayed in processing the paperwork. Also on March 17, Freitag sent a memorandum to Barry O'Neill, Carmichael's supervisor, with a copy to Robert Ayers, the warden at Pelican Bay, complaining that her reports of inmate misbehavior were being "denied or thrown away," thus

causing her "authority and discretion [to be] undermined." On March 18, she issued Inmate X another 115 Form for indecent exposure.

On April 7, 1999, Inmate X requested that Freitag open the shower door to allow him to return to his cell. When she did so, he pushed his towel into the doorway and, standing naked, masturbated in front of her until she and another correctional officer escorted him back to his cell. Freitag submitted a 115 Form charging Inmate X with indecent exposure, but the violation was subsequently changed by a supervisor to willful delay of a peace officer, a lower-level offense. Later that day, Freitag sent a letter to Teresa Schwartz, the associate warden in charge of the SHU, chronicling the conduct of Inmates X and Z, complaining that her supervisors were "procrastinating" in responding to the sexually abusive behavior, and recommending enforcement of the CDCR's policy of referring repeat offenders to the district attorney's office for prosecution. She also stated: "For the supervisors' calloused exchange of me, and other female staff, as a sexual favor to gain [Inmate X's] cooperation, I should be recompensed for my injury."

On April 15, 1999, Freitag wrote a letter to Cal Terhune, the CDCR's director, in which she alleged that Inmate X was "causing a hostile worksite," that her "[s]upervisors have delayed responding and been reluctant to respond," and that "[t]here has been no support to prosecute[Inmate X] for his sexual attacks and harassment." Several days later, on April 23, Freitag was called to a meeting with Schwartz and O'Neill. At the meeting, Schwartz informed Freitag that she was being relieved of her duty in the SHU pending a psychiatric evaluation; Schwartz stated that the prison was taking the action in

response to Freitag's "incoherent" memoranda regarding inmate harassment. Schwartz also threatened to terminate her. Freitag was permitted to return to the SHU only after the evaluation deemed her fit for duty.

On July 7, the day after Freitag returned to the SHU, she witnessed Inmate Y masturbating in the yard. She submitted a 115 Form charging him with indecent exposure, but her supervisors declined her recommendation that he be disciplined with escort status. On July 15, Freitag wrote another memorandum to Ayers requesting that officers in the SHU receive additional training on how to manage inmates with behavioral problems. She detailed an incident that occurred the day before in which Inmate Y refused to be handcuffed by two correctional officers, one of whom allegedly responded by slamming the cuff port door on the prisoner's hands.

On July 26, Pelican Bay initiated an internal affairs (IA) investigation of Freitag. The investigation was initiated by Ayers and arose from purported factual inaccuracies in Freitag's memorandum regarding the July 14 incident involving Inmate Y. On August 6, Ayers initiated another IA investigation of Freitag's allegations that her supervisors were destroying her disciplinary reports. The request submitted by Ayers alleged that Freitag had made "slanderous accusations against other staff."

On August 11, 1999, Freitag filed a formal complaint with the California Department of Fair Employment and Housing (DFEH). She alleged that she had been sexually harassed by Pelican Bay inmates, that she complained about the harassment to supervisors Glen Rodman, Carmichael, Schwartz, Ayers, and Terhune, that "my employer did not take the proper steps to address my

complaint," and that in retaliation for her complaints she was threatened by Schwartz with termination and temporarily relieved of duty in the SHU. Augustine Lopez, the prison's Equal Employment Opportunity Coordinator, prepared the institution's response, which concluded that Freitag's allegations were unsubstantiated. As part of his investigation, Lopez interviewed Ayers and several other Pelican Bay administrators, but he acknowledges that he later destroyed the notes from those interviews.

On August 17, 1999, Freitag sent a letter to California State Senator Richard Polanco in which she alleged that she and other female correctional officers were regularly subjected to sexually abusive behavior in the SHU and that supervisors failed to respond adequately to her complaints regarding the inmate conduct. She also claimed that her disciplinary reports either were ignored completely or were not acted upon in sufficient time to permit the disciplining of inmates. She sent a second letter to Polanco dated September 24, 1999, with a copy to Terhune, in which she further described the mistreatment that she received from Pelican Bay inmates and staff. In October, Polanco contacted the California Office of the Inspector General (IG), a state agency that oversees the CDCR, and requested that it initiate an investigation of the allegations in Freitag's letters. The IG sent several investigators, including Senior Deputy Inspector General Richard Ramsdell, to Pelican Bay; from November to December 1999, they interviewed dozens of prison inmates and employees, including Freitag, reviewed the inmates' central files, and contacted the Del Norte County District Attorney's Office regarding the referral of indecent exposure complaints from the prison. Freitag also exchanged letters with Ramsdell during the investigation.

The IG published a report of its investigation on July 11, 2000. The findings were uniformly and pointedly damning: The agency determined that (1) inmates in the SHU "regularly subject female correctional officers to lewd exhibitionism and exhibitionist masturbation"; (2) "supervisors and top administrative staff at Pelican Bay have not responded appropriately to complaints about inmates directing exhibitionist masturbation toward female staff members and have made little effort to take advantage of the options available to control exhibitionist masturbation behavior"; (3) "the security housing unit is not effectively using the prison disciplinary process and available legal sanctions in handling exhibitionist masturbation cases"; (4) Pelican Bay had "stopped referring exhibitionist masturbation cases to the district attorney"; and (5) Warden Ayers had taken "no definitive actions . . . to address exhibitionist masturbation directed at female correctional officers by male inmates." The IG also reported that Lopez informed one state investigator that "[t]he reason the inmates hit on [the female correctional officers] is that they're a bunch of lesbians."

In addition to the two IA investigations of her initiated by Ayers in July and August 1999, Freitag was targeted by at least two more investigations following her DFEH complaint and letters to Polanco. On September 15, 1999, Ayers requested an IA investigation regarding Freitag's purported improper use of state resources, such as copy machines and telephones, for the purpose of pursuing her complaints. On October 22, Correctional Captain Paul Dillard sent Ayers a memorandum recommending that IA investigate allegedly false claims by Freitag that a correctional officer contaminated an inmate's food in May of that year. Freitag was formally

interviewed regarding the latter charge on November 19, 1999.

On January 13, 2000, while the IG's investigation was being conducted, Schwartz sent Freitag a preliminary notice of adverse action stemming from the IA investigation into Freitag's report of the July 14, 1999, incident involving Inmate Y. Ayers recommended that Freitag be suspended for five days as a result of the investigation's determination that she falsified facts in her written memorandum describing the incident. On February 8, while the agency investigation was still in progress, Schwartz sent a second notice of adverse action, this time arising out of the prison's finding that Freitag made false accusations regarding her fellow officer contaminating the inmate's food. As a result of the findings of the two IA investigations, Freitag was terminated shortly before the Office of the Inspector General issued its report. Freitag then initiated an administrative appeal of her termination before the California State Personnel Board. As far as the record before us reveals, the administrative appeal was still pending at the time the parties filed their briefs with this court.

II

Freitag filed her initial complaint in the district court on June 27, 2000. She alleged that (1) the CDCR is liable under Title VII of the Civil Rights Act of 1964 for sexual harassment pursuant to a hostile work environment theory; (2) the CDCR is liable under Title VII for retaliation; (3) Ayers, Schwartz, Carmichael, Rodman, Dillard,

O'Neill, George Neotti,[2] and Lopez are liable under 42 U.S.C. § 1983 for violating various of her constitutional rights; and (4) all of the defendants are liable under 42 U.S.C. § 1985 for conspiring to violate her constitutional rights. Freitag sought compensatory and punitive damages as well as injunctive relief.

On March 25, 2002, the district court granted in part and denied in part the defendants' motion for summary judgment. It denied the motion with respect to the following claims: (1) the Title VII hostile work environment claim against the CDCR, (2) the Title VII retaliation claim against the CDCR based upon adverse employment actions not including Freitag's termination, and (3) the § 1983 claim that the individual defendants retaliated against Freitag in violation of her First Amendment rights. A jury trial commenced in March 2003. Freitag and several of her fellow female correctional officers testified regarding the sexually abusive environment in the SHU and the lack of an adequate institutional response. Freitag's expert on prison administration, William Katsaris, testified that Pelican Bay was "the only institution I have come across that has a serious problem with [exhibitionist masturbation]." He stated that prisons throughout the country have controlled the problem in part by installing semi-opaque finish to control booth windows so that officers can see out but inmates cannot see in.[3] He

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[2] Neotti was Pelican Bay's employee relations officer.

[3] Pelican Bay did install opaque material on SHU cell doors, which prevented officers from viewing celled inmates from the waist down, but it did not do so until late 2000 or early 2001, after Freitag was terminated. Further, it did not install the material on control booth windows and thus did not address the problem of inmates masturbating in the prison yard knowing that female correctional officers are on duty.

further testified that Pelican Bay administrators could have taken, but failed to take, other corrective actions such as imposing serious disciplinary measures for sexual misconduct, restraining sexually abusive inmates or taking away their yard privileges, and working with the district attorney's office to prosecute serious and repeat offenders. In addition, the IG's report was admitted into evidence over the defendants' objection, and Ramsdell testified extensively regarding the agency's investigation into Freitag's complaints and the prison's failure to take the requisite corrective actions.

The jury returned a unanimous verdict on April 3, 2003. It found the CDCR liable under Title VII for sexual harassment and retaliation, and Ayers, Schwartz, and Lopez liable under § 1983 for retaliation in violation of Freitag's First Amendment rights. It awarded Freitag $500,000 in economic damages and $100,000 in non-economic damages, and $100 in punitive damages against each Ayers, Schwartz, and Lopez. The verdict form did not require the jury to determine how much each defendant was liable for on each claim – it found the CDCR and Ayers, Schwartz, and Lopez jointly and severally liable for the entire amount of compensatory damages.

On May 15, 2003, Freitag moved to amend the judgment to include permanent injunctive relief. The district court granted her motion in part, finding that "this Court has the authority to fashion an injunction that benefits not only Plaintiff, but all female correctional officers and other staff members at Pelican Bay who have been or may be harmed by CDC's unlawful conduct." The court entered the following permanent injunction:

> The California Department of Corrections,[4] its agents, officers, successors in office, employees and all persons acting in concert or participating with the department are permanently enjoined from engaging in any employment practices, or taking any other personnel action, for the purpose or with the effect of maintaining a sexually hostile work environment at Pelican Bay State Prison, or otherwise discriminating against any Pelican Bay State Prison employee on the basis of sex. The California Department of Corrections, its agents, officers, successors in office, employees and all persons acting in concert or participating with the department are further enjoined from engaging in any employment practices, or taking any other personnel action, for the purpose or with the effect of retaliating against any Pelican Bay State Prison employee for complaining about, or otherwise opposing, practices made unlawful by Title VII.

The district court denied Freitag's request that the court mandate specific measures to alleviate the problems she raised, opting instead to refer the matter to a special master with the authority to monitor compliance with the injunction and to develop a remedial plan. The court also awarded Freitag attorneys' fees.

The CDCR, Ayers, Schwartz, and Lopez appealed, raising the following arguments: (1) the CDCR cannot as a matter of law be liable under Title VII for a hostile work environment created by inmates and, even if it could be

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[4] At the time the district court granted injunctive relief, the agency was called the California Department of Corrections. In May 2005, it reorganized and changed its name to the California Department of Corrections and Rehabilitation.

liable, substantial evidence does not support the jury's verdict of liability in this case; (2) substantial evidence does not support the jury's verdict that the CDCR is liable for retaliation under Title VII; (3) substantial evidence does not support the verdict against Ayers, Schwartz, and Lopez; (4) the award of compensatory and punitive damages is not supported by substantial evidence; and (5) the district court abused its discretion in granting injunctive relief.

III

We review a district court's conclusions of law *de novo*. *See Tritchler v. County of Lake*, 358 F.3d 1150, 1154 (9th Cir. 2004). A jury's verdict, including a damages award, must be upheld if supported by "substantial evidence." *See Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). The district court's grant of injunctive relief is reviewed for an abuse of discretion and for the application of correct legal principles. *See Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1079 (9th Cir. 2004).

IV

Hostile Work Environment

We first address the CDCR's contention that it cannot, as a matter of law, be liable under Title VII for maintaining a hostile work environment caused by inmate misconduct. The contention is unsupported by the entire weight of case authority in this circuit and others, and we are compelled to reject it.

In the Ninth Circuit, employers are liable for harassing conduct by non-employees "where the employer either

ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct." *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 756 (9th Cir. 1997); *see also Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 968 (9th Cir. 2002). In recognizing that employers may be liable for third-party conduct, we, along with several other circuits, *see, e.g., Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 811-12 (7th Cir. 2001); *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1244 (10th Cir. 2001); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111 (8th Cir. 1997), have relied in part upon a regulation of the Equal Employment Opportunity Commission that provides that employers may be held liable for the acts of non-employees where the employer "knows or should have known of the conduct and fails to take immediate and appropriate corrective action." 29 C.F.R. § 1604.11(e). This theory of liability is grounded not in the harassing act itself – i.e., inmate misconduct – but rather in the employer's "negligence and ratification" of the harassment through its failure to take appropriate and reasonable responsive action. *See Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir. 2005).

Notwithstanding the clarity of our law on this point, the defendants request that we become the first court in the country to carve out an exception to Title VII whereby prisons, due to their distinctive character and problems, and in particular their "inherently hostile environment," are immune from lawsuits by correctional officers arising from sexual harassment by inmates. In support of this position, the defendants cite several cases in which federal courts have treated prisons differently in the context of civil rights claims. For example, in *Slayton v. Ohio Department of Youth Services*, 206 F.3d 669, 677 (6th Cir.

2000), in which a female correctional officer at a juvenile detention center alleged that the institution maintained a sexually hostile work environment caused in large part by inmate misconduct, the Sixth Circuit noted:

> Prisoners, by definition, have breached prevailing societal norms in fundamentally corrosive ways. By choosing to work in a prison, corrections personnel have acknowledged and accepted the probability they will face inappropriate and socially deviant behavior.

Nevertheless, the *Slayton* court upheld a jury verdict in favor of the plaintiff, ruling that, although allegations of inmate misconduct alone cannot support a hostile work environment claim, "this general rule against prison liability for inmate conduct does not apply when the institution fails to take appropriate steps to remedy or prevent illegal inmate behavior." *Id.*

The defendants also cite the following language from *Powell v. Morris,* 37 F. Supp. 2d 1011, 1017 (S.D. Ohio 1999):

> The propensity of courts to decline imposing liability for prisoner acts is based on solid logical and practical foundations: anyone who works at a prison . . . must expect some off-color interactions. . . . It is absurd to expect that a prison can actually stop all obscene comments and conduct from its inmates – people who have been deemed unsuited to live in normal society.

However, the defendants neglect to cite the very next sentence of the *Powell* opinion: "The most we can expect and require prisons to do is to implement and enforce policies reasonably calculated to minimize such harassment and protect the safety of its employees." *Id.* The

defendants also cited *Powell* in the district court but there too failed to include the abovementioned sentence, an act the district judge characterized as "illustrative of Defendants' tendency to mischaracterize the relevant case law." Notably, although the defendants cite *Powell* in support of their argument that "Title VII does not impose liability on a prison employer for a hostile work environment caused by inmates under a negligence theory of direct liability," they fail to refer to a passage in the opinion that is far more pertinent to the present case: "Courts have repeatedly declined to impose sexual harassment liability upon correctional institutions for the sexually offensive conduct of inmates, *as long as the defendant institution took proper preventative and remedial steps with regard to inmate behavior.*" *Id.* (emphasis added).

In short, the defendants cite no authority, and we have found none, holding that prisons are uniquely exempt from liability for sexual harassment under Title VII, nor have they proffered any evidence that Congress intended prison employers to be thus exempt. Further, we see no persuasive argument, legal or otherwise, to support the novel position that the defendants take on this issue. Nothing in the law suggests that prison officials may ignore sexually hostile conduct and refrain from taking corrective actions that would safeguard the rights of the victims, whether they be guards or inmates. As the district court found, "even in an inherently dangerous working environment, the focus remains on whether the employer took reasonable measures to make the workplace as safe as possible." The CDCR is not, by simple virtue of its status as a correctional institution, immune under Title VII from a legal obligation to take such measures and to

protect its employees to the extent possible from inmate sexual abuse.

The next question is whether substantial evidence supports the jury's finding that the CDCR is liable for maintaining a hostile work environment in this case. A plaintiff asserting a Title VII claim under a hostile work environment theory must show (1) the existence of a hostile work environment to which the plaintiff was subjected, and (2) that the employer is liable for the harassment that caused the hostile environment to exist. *See Little,* 301 F.3d at 966 (citing *Faragher v. City of Boca Raton,* 524 U.S. 775, 787-89 (1998)). To establish the existence of a hostile work environment, "a plaintiff must prove that (1) she was subjected to verbal or physical conduct of a sexual nature, (2) this conduct was unwelcome, and (3) this conduct was sufficiently severe or pervasive to alter the conditions of . . . employment and create an abusive working environment." *Id.* (internal quotations omitted). The third element requires us to consider the totality of the circumstances and whether the harassment was both objectively and subjectively abusive. *Id.* With respect to the question of liability for harassment caused by a third party, the employer's corrective measures must be "reasonably calculated to end the harassment"; the reasonableness of the corrective action will depend on, *inter alia*, the employer's ability to stop the harassment and the promptness of the response. *See Ellison v. Brady,* 924 F.2d 872, 882 (9th Cir. 1991) (internal quotations omitted); *see also Galdamez*, 415 F.3d at 1024.

The jury found that Freitag was subjected to a hostile work environment due to inmate sexual misconduct, and that the CDCR was liable because it failed to take prompt

and effective remedial action reasonably calculated to address the misconduct. We conclude with little difficulty that substantial evidence supports each finding. With respect to the finding that Freitag was subjected to a hostile employment environment: First, there is sufficient evidence that Freitag was repeatedly exposed to conduct of a sexual nature. The jury heard testimony and reviewed exhibits that established that Freitag witnessed inmates masturbating in an exhibitionist manner, oftentimes while they directed verbal taunts and crude remarks at her. Second, the defendants' argument to the contrary notwithstanding, there was substantial evidence that Freitag did not welcome the sexually abusive conduct merely by accepting a job in the SHU. Although it certainly would have been reasonable for Freitag to anticipate substantial inmate misbehavior, given the severity of the crimes committed by those incarcerated at Pelican Bay, *see Slayton,* 206 F.3d at 677, she also had reason to expect that prison officials would seek in good faith to control the most extreme forms of sexual misconduct. In any event, contemplating some difficulties is a far cry from *welcoming* a constant barrage of sexual abuse that, according to the testimony at trial, was allowed to continue virtually unfettered for the duration of Freitag's employment at the prison. Third, substantial evidence supports the jury's finding that the exhibitionist masturbation was sufficiently severe or pervasive to constitute abuse. On this point, the defendants argue that, following Freitag's April 7, 1999 memorandum to Schwartz, which they characterize as her first complaint to prison administrators, she "witnessed only three incidents of inmate masturbation." Even accepting the defendants' argument that the CDCR did not know about such behavior until April 7, 1999, a single incident of severe abuse can constitute a hostile

work environment. *See Little,* 301 F.3d at 967 (citing *Clark County Sch. Dist. v. Breeden,* 532 U.S. 268 (2001)). More important, however, the defendants' time line misrepresents the record – it ignores Freitag's March 17, 1999 memorandum to O'Neill and Ayers in which she complained that her disciplinary reports on inmate sexual misconduct were being ignored. The defendants' tally thus does not account for the March 18 and April 7 incidents in which Freitag was exposed to exhibitionist masturbation. We find no basis to overturn the jury's determination on this issue.

The jury's second principal finding – that the CDCR failed to take prompt, corrective, and reasonable action to address the issue of inmate sexual misconduct – is also supported by substantial evidence. The jury heard testimony on this question from, among others, Katsaris, who testified that Pelican Bay is the only institution he has encountered with such a pervasive problem of inmate sexual misconduct. He testified regarding the corrective measures that other prisons have undertaken but that Pelican Bay had to that point ignored, including installing semi-opaque film on control towers and cells and imposing serious disciplinary measures on repeat offenders. The jury also had before it the IG's report,[5] which enumerated

[5] The district court did not err in admitting the IG's report into evidence at trial. Under the hearsay exceptions for business records, Fed. R. Evid. 803(6), and public records, *id.* 803(8), the report was afforded a presumption of reliability and trustworthiness that the defendants failed to rebut. *See Gilbrook v. City of Westminster,* 177 F.3d 839, 858 (9th Cir. 1999). Specifically, Rule 803(8) allows the admission of reports of public agencies "setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." FED. R. EVID. 803(8); *see also Johnson v. City of*

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the agency's findings that, among other things, the administrative staff at Pelican Bay had not responded appropriately to the concerns expressed by female officers about exhibitionist masturbation, and the institution had not taken adequate steps to correct the problem. The defendants' own brief acknowledges that "[t]he correctional staff controls inmates primarily by the inmate disciplinary process, physical restraints, revocation of privileges, and referral for criminal prosecution," all measures the evidence shows it failed to invoke in this case. Accordingly, there was more than enough evidence to support the jury's finding that the prison failed to respond adequately or reasonably to the sexual abuse directed at Freitag and other female correctional officers.

For these reasons, we affirm the jury's verdict that the CDCR may be, and is in this case, liable under Title VII for maintaining a hostile work environment at Pelican Bay.

Title VII Retaliation

The defendants urge that substantial evidence does not support the jury's finding that the CDCR is liable under Title VII for retaliating against Freitag. A plaintiff may meet his burden of proof for a claim of retaliation under Title VII by showing, by a preponderance of the evidence, (1) involvement in protected activity opposing an

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Pleasanton, 982 F.2d 350, 352 (9th Cir. 1992) (holding that, under Rule 803(8), reports of public agencies shall be admitted where the challenging party fails to meet its burden to show untrustworthiness). The defendants had a fair opportunity to challenge the reliability of the report through their cross-examination of Ramsdell. The district court did not abuse its discretion in finding the report reliable.

unlawful employment practice, (2) an adverse employment action, and (3) a causal link between the protected activity and the adverse action. *See Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 252-53 (1981) (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)). With respect to the first element, "opposition clause protection will be accorded whenever the opposition is based on a *reasonable belief* that the employer has engaged in an unlawful employment practice." *Moyo v. Gomez,* 40 F.3d 982, 984 (9th Cir. 1994) (internal quotes omitted) (emphasis in original).

The defendants make two related arguments as to CDCR retaliation. First, they contend that Freitag's belief that she opposed an unlawful employment action was unreasonable because "Title VII proscribes neither harassment by prison inmates nor a prison's failure to take adequate steps to address the harassment." That argument is foreclosed by our analysis in the previous section, which requires no repetition here. Second, the defendants argue that "[a]n employer cannot engage in unlawful retaliation if it does not know the employee has opposed or is opposing a violation of Title VII." To the extent that their contention is that they did not know Freitag was opposing unlawful sexual harassment, it is belied by (1) Freitag's April 7, 1999 memorandum to Schwartz, which stated that she should be "recompensed" for the injury she suffered due to the inmate misconduct she described and the prison's failure to respond; (2) her April 15, 1999, memorandum to Terhune, which alleged that the prison was doing nothing to address the "hostile worksite" created by inmate exhibitionist masturbation; and (3) her filing of a formal complaint with DFEH in August 1999 specifically alleging retaliation and harassment based

upon her sex. To the extent that the defendants argue that they did not understand that the facts Freitag alleged regarding their failure to respond to the problems constituted a violation of Title VII, their argument is also without merit. The dispositive question is not whether the administrators at Pelican Bay believed that their failure to correct the complained of conditions constituted a violation of Title VII, but rather (1) whether they were aware that Freitag had "opposed" that failure and (2) whether Freitag's belief that their conduct was unlawful was reasonable. *See Burdine,* 450 U.S. at 252-53. Notwithstanding the defendants' erroneous opinion of the law, they had the requisite knowledge regarding Freitag's complaints. As Freitag points out in her brief, "the inability of the defendants to grasp the mandate of Title VII, particularly in light of the clear language of 29 C.F.R. 1604.11, [] did not give them carte blanche to retaliate against [her] just because she evidently understood the law better than they did."

Because the defendants raise no meritorious challenge to the jury's finding that the CDCR is liable under Title VII for retaliating against Freitag, we affirm the verdict on this claim.[6]

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[6] On June 22, 2006, the defendants submitted a letter pursuant to Federal Rule of Appellate Procedure 28(j) in which they request that we consider the Supreme Court's recent decision in *Burlington Northern & Sante Fe Railway Co. v. White,* 126 S. Ct. 2405 (2006). They argue that *Burlington* rejected the Ninth Circuit's definition of what constitutes an adverse employment action and, accordingly, that we must reverse the Title VII retaliation verdict because the jury was not instructed that the employment actions must be considered adverse by a *reasonable* employee. *See Burlington,* 126 S. Ct. at 2415. We conclude that any instructional error was harmless. The instruction given to the jury stated that an adverse action "is defined as any action that is reasonably likely

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First Amendment Retaliation

The jury found that Ayers, Schwartz, and Lopez retaliated against Freitag in violation of her First Amendment rights. On appeal, the defendants challenge the jury's finding with respect to each element required to establish a First Amendment claim against a public employer: (1) The employee engaged in constitutionally protected speech, (2) the employer took adverse employment action against the employee, and (3) the employee's speech was a "substantial or motivating" factor in the adverse action. *See Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003). There can be no serious dispute that substantial evidence supports the jury's findings that the second and third elements were met with respect to Ayers and Schwartz.[7] Ayers initiated several IA investigations of Freitag shortly after she contacted Polanco, and Schwartz temporarily relieved her of duty in the SHU and ordered her to submit to a psychiatric evaluation, stating

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to deter the plaintiff or others from engaging in protected activity." The instruction, if erroneous, was harmless because the jury almost certainly would have found that the adverse employment actions it considered with respect to Freitag's Title VII claim – her temporary removal from duty in the SHU, the psychiatric evaluation, and the internal affairs investigations – would be considered materially adverse by a reasonable employee. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 805 (9th Cir. 2001) (holding that an instructional error in a civil case requires reversal only where the error is not "more probably than not harmless").

[7] There is no evidence that Lopez is liable for retaliation under § 1983 because there is no evidence that he was responsible for, participated in, or even had knowledge of, any adverse employment action taken against Freitag. He did not contribute to the decision to relieve Freitag from her duty in the SHU, to refer her for psychiatric evaluation, to initiate the internal affairs investigations, or to terminate her. Thus, we reverse the jury verdict with respect to Lopez.

explicitly that she was doing so as a result of Freitag's complaints of inmate harassment. Both also approved her suspension and termination,[8] and there was sufficient evidence from which the jury could have inferred that Freitag's speech was a substantial or motivating factor in these adverse actions. *See Coszalter*, 320 F.3d at 977 (holding that a proximity in time of between three and eight months could support an inference of retaliation). However, because the Supreme Court's recent decision in *Garcetti v. Ceballos,* 126 S. Ct. 1951 (2006), modified prior First Amendment jurisprudence with respect to the first element – employee protected speech – we remand Freitag's § 1983 claim to the district court for reconsideration in light of that decision.[9]

In *Ceballos,* the Supreme Court considered whether an internal memorandum written by a deputy district attorney to his supervisors regarding what he believed to be misconduct in an investigation was protected speech under the First Amendment. 126 S. Ct. at 1955-57. It concluded that, under *Connick v. Myers,* 461 U.S. 138, 147 (1983), the issue is not only whether the speech in question addresses a matter of public concern, but also whether it is made *as a citizen. See id.* at 1956 (citing

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[8] The defendants argue that the district court's grant of summary judgment to the CDCR on Freitag's termination claim under Title VII necessarily barred consideration of her claim for termination under § 1983. That argument is foreclosed by our precedent. *See Allen v. Iranon,* 283 F.3d 1070, 1074 (9th Cir. 2002) (rejecting the defendants' attempt to import a Title VII standard in a § 1983 case because "the Title VII [burden-shifting] formula . . . allocates burdens of proof more favorably to defendants").

[9] Subsequent to the issuance of *Ceballos,* we requested supplemental briefs from the parties addressing its effect on this case.

Connick, 461 U.S. at 146-47). The Court then determined that Ceballos did *not* speak as a citizen when he wrote the memorandum and thus did not engage in constitutionally protected speech, holding:

> The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. That consideration – the fact that Ceballos spoke as a prosecutor fulfilling his responsibility to advise his supervisor about how best to proceed with a pending case – distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Id. at 1959-60 (internal citations omitted). Ceballos's First Amendment claim failed because, "[w]hen he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee" as opposed to a citizen for purposes of the First Amendment. *Id.* at 1960.

The Court in *Ceballos* relied in large part upon its ruling in *Pickering v. Board of Education,* 391 U.S. 563 (1968). It considered the case a "useful starting point" in its First Amendment analysis, and the speech at issue in *Pickering* a material contrast to that in the case before it. 126 S. Ct. at 1957. In *Pickering,* a school teacher wrote a letter to a local newspaper criticizing the school board's allocation of financial resources and the district superintendent's alleged attempt to prevent teachers from opposing a proposed school bond. 391 U.S. at 566. The teacher was subsequently dismissed and he sued, claiming that

the letter was protected by the First Amendment. *Id.* at 567. The Supreme Court agreed, ruling that the teacher did not, by accepting his job, "relinquish the First Amendment rights [he] would otherwise enjoy as[a] citizen[] to comment on matters of public interest." *Id.* at 568. In addition, the Court noted that teachers are

> the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

Id. at 572.

We are confronted with two issues: (1) whether the jury was instructed to consider only speech that, in light of *Ceballos,* is protected under the First Amendment, and (2) whether, if the jury was permitted to consider speech that is not protected, the instruction was harmless. With respect to the first issue, the jury was instructed in pertinent part as follows:

> Examples of speech protected by the First Amendment include:
>
> (a) Reporting sexually hostile inmate conduct to agents of the California Department of Corrections, either formally or informally;
>
> (b) Documenting Pelican Bay State Prison's responses or failures to respond to Plaintiff's reports of sexually hostile inmate conduct;
>
> (c) Informing Cal Terhune, Director of the California Department of Corrections, of either the inmates' sexually hostile conduct or of Pelican

> Bay State Prison's responses or failures to respond;
>
> (d) Informing State Senator Richard Polanco either of sexually hostile conduct or of the Pelican Bay State Prison's responses or failures to respond;
>
> (e) Reporting either the sexually hostile conduct or Pelican Bay State Prison's responses or failures to respond to the Office of the Inspector General; or
>
> (f) Cooperation with the investigation conducted by the Office of the Inspector General.

The defendants proffer two arguments why, in view of *Ceballos,* this instruction is erroneous and requires us to reverse the jury's verdict with respect to the § 1983 claim. First, they assert that Freitag did not in any instance speak "as a citizen" for purposes of constitutional analysis. Second, they contend that Freitag's speech did not address a matter of public concern. We disagree with respect to items (d), (e), and (f) – Freitag's letters to Senator Polanco and her written and oral communications with the Inspector General – all of which is related to the sexual abuse that she and other female correctional officers suffered at Pelican Bay. We think it clear that these communications are protected under the First Amendment.

With respect to the defendants' first argument, *Pickering* and *Ceballos* require the conclusion that Freitag acted as a citizen when she wrote letters to Senator Polanco and communicated with the Inspector General regarding her complaints of sexual harassment. Her right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a

democratic society regardless of his status as a public employee. *See Pickering,* 391 U.S. at 568. Indeed, these particular communications undoubtedly "bore similarities to letters submitted by numerous citizens every day." *Ceballos,* 126 S. Ct. at 1960 (citing *Pickering*). Under *Ceballos,* Freitag does not lose her right to speak as a citizen simply because she initiated the communications while at work or because they concerned the subject matter of her employment. *Id.* at 1959. The critical inquiry is instead whether Freitag engaged in the relevant speech "pursuant to [her] official duties." 126 S. Ct. at 1960. With respect to her contact with Senator Polanco and the IG, the answer is "No."[10] It was certainly not part of her official tasks to complain to the Senator or the IG about the state's failure to perform its duties properly, and specifically its failure to take corrective action to eliminate sexual harassment in its workplace. Rather, it was Freitag's responsibility *as a citizen* to expose such official malfeasance to broader scrutiny. Accordingly, in these instances, for purposes of the First Amendment she spoke as a citizen.

As to the defendants' second argument that Freitag's complaints did not address a matter of public concern, we strongly disagree. Her assertions that inmates at Pelican Bay engaged in sexually abusive behavior with respect to the female guards while the prison's administrators failed to take appropriate corrective measures is "relevan[t] to

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[10] We note that one IA investigation of Freitag arose from her purported improper use of state resources while on the job. That the defendants considered Freitag's use of copy machines and telephones to complain to outsiders about the harassment to which she was subjected improper and outside the scope of her employment is further evidence that her complaints were not made pursuant to her official duties.

the public's evaluation of the performance of governmental agencies." *Coszalter,* 320 F.3d at 973-74. Notably, several female correctional officers, including Freitag, testified at trial that the hostile work environment at Pelican Bay made it very difficult for them to perform their duties, and Katsaris testified that, in such circumstances, the prison's authority over its inmates is significantly eroded. Further, although the proper administration of our prisons generally is undoubtedly of great public interest, the specific allegations in this case address a matter of acute concern to the entire community. A vast majority of our state's prisoners will reenter the general population some day, some sooner than others.[11] It certainly would be of grave concern if those inmates were being released into our neighborhoods from an environment in which the State of California condoned sexually abusive behavior and the harassment of women.

For these reasons, we hold that Freitag's communications with Senator Polanco and the California Inspector General constitute constitutionally protected speech. However, under the district court's instruction, those were not the only communications the jury was entitled to consider in determining whether Ayers and Schwartz retaliated against Freitag in violation of her First Amendment rights. The relevant jury instruction also listed, as examples of protected speech, Freitag's internal reports of inmate sexual misconduct and documentation of the prison's failure to respond, as well as her communications with Terhune, the director of the CDCR. To the

[11] The record is unclear as to whether any specific inmate who Freitag alleges contributed directly to the sexually hostile work environment has been released.

extent that the jury may have considered internal forms prepared by Freitag, it is clear that, under *Ceballos,* such activity is *not* constitutionally protected. For purposes of First Amendment analysis, Freitag submitted those reports pursuant to her official duties as a correctional officer and thus not in her capacity as a citizen. Whether Freitag's April 15, 1999 letter to Terhune is protected under the First Amendment is a closer question. We are unsure whether prison guards are expected to air complaints regarding the conditions in their prisons all the way up to the Director of the CDCR at the state capitol in Sacramento. We are not aware, for example, what the union contract provides with respect to the persons to whom such grievances may or must be presented. The district court, having presided over this and related litigation for several years, may be in a better position to make the relevant factual determinations and, accordingly, we remand to it the issue of whether the Terhune letter is covered by the First Amendment.

Because the relevant instruction permitted the jury to consider, along with speech that we hold to be constitutionally protected, at least some unprotected speech as well, we remand Freitag's § 1983 claim to the district court for reconsideration. On remand, the district court shall make two determinations: (1) whether the Terhune letter constitutes protected speech, and (2) whether the jury instruction, which included as examples of protected speech either two or three items of unprotected speech, was more probably than not harmless. *See Swinton,* 270 F.3d at 805. In other words, is it more likely than not that the jury verdict was not affected by the erroneous inclusion of the two or three examples of unprotected speech? Given the district judge's expertise and his familiarity

with the facts in the lengthy trial over which he presided, we think that he is best equipped to answer these questions in the first instance.

Damages

The defendants also challenge the jury's damages award, arguing that it is not supported by substantial evidence. The jury heard testimony from two expert witnesses regarding the economic damages that Freitag suffered as a result of the harassment and retaliation inflicted upon her by the CDCR and Pelican Bay prison administrators, as well as testimony from her treating psychiatrist regarding non-economic damages resulting from the same. The jury determined that, as a result of the harassment and the various retaliatory acts by the defendants, including the internal affairs investigations that eventually led to Freitag's termination, and the termination itself, she suffered $500,000 in economic damages. It also found that, as a result of the defendants' actions, she suffered $100,000 in non-economic damages.

The special verdict form did not require the jury to determine how much each defendant is liable for under each claim. Instead, the jury found all four appellants – the CDCR, Ayers, Schwartz, and Lopez (whom we have ordered dismissed) – jointly and severally liable for the entire $600,000 in compensatory damages. The defendants do not challenge on appeal the fact that the jury held them jointly and severally liable for the entire award. They argue only that the amount is not supported by substantial evidence.

Assuming that the jury's findings as to all of the various claims were to stand, we would have no difficulty

holding that the total sum awarded was supported by substantial evidence. We are left in a difficult position *vis-à-vis* the damages award, however, because although we affirm the jury's verdict with respect to Freitag's Title VII claims, we are remanding her § 1983 claim. We do not wish to speculate whether the entire amount of compensatory damages would be justified if only Freitag's Title VII claims remained following the district court's reconsideration on remand, or what effect a modification of the verdict as to the § 1983 claim might have on the amount to be awarded. We prefer to leave that question to the district court for its initial review, if such review is necessary after it has addressed the harmless error question we have asked it to consider with respect to the § 1983 claim. Thus, we remand the jury's damages award with instructions to reconsider, if necessary, whether the $600,000 award of compensatory damages remains valid. *See Maynard v. City of San Jose,* 37 F.3d 1396, 1406 (9th Cir. 1994). Because the award of $100 in punitive damages against each Ayers and Schwartz was in connection with the § 1983 claim, we remand that award for reconsideration, if necessary, as well. In addition, because the district court may wish to reconsider the extent to which Freitag remains a prevailing party after it determines what, if any, adjustments it must make with respect to liability and damages, we also remand the issue of attorneys' fees for reconsideration, if necessary.

Injunctive Relief

The defendants assert that the district court abused its discretion in granting permanent injunctive relief. The sole contention in support of their argument is that

Freitag no longer works for the CDCR and thus cannot benefit from the injunction.

The defendants cite only *Rau v. Apple-Rio Management Company, Inc.*, 85 F. Supp. 2d 1344 (N.D. Ga. 1999), in which the district court granted a plaintiff limited injunctive relief following a favorable jury verdict on her Title VII claims. The court did not grant the plaintiff's request that her employer remove documents from her personnel file in part because she was no longer an employee, despite the fact that she opined that she could be reinstated if successful in a separate claim for constructive discharge. *Rau*, 85 F. Supp. 2d at 1351 n.4. The defendants urge that Freitag's re-employment with the CDCR is similarly "speculative," and thus that injunctive relief on her behalf is not appropriate.

Without endorsing the Georgia district court decision, we acknowledge that Freitag's reinstatement to employment with the CDCR is not certain. Nevertheless, when the district court issued its injunction, Freitag was still in the process of pursuing her state administrative appeal in which she maintains that she is entitled to retain her position as a correctional officer at Pelican Bay. Our decision in *Nanty v. Barrows Co.*, 660 F.2d 1327 (9th Cir. 1981) (overruled on other grounds, *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756 (9th Cir. 1996)), is pertinent. In *Nanty*, we held that a Native American truck driver was unlawfully discriminated against under Title VII when a company failed to hire him because of his race. 660 F.2d at 1332. Although we remanded Nanty's request for an injunction requiring the company to hire him because the record was not clear whether it would have given him the job absent its discriminatory actions, we held that he nevertheless was entitled to an injunction

prohibiting the company from discriminating on the basis of race in its future hiring. *Id.* at 1333. We affirmed the injunction in part because the question whether the plaintiff was entitled to the job he sought had not been finally resolved and, thus, he retained a personal interest in ensuring that the company's discriminatory activity be enjoined. *See id.*

In California, permanent state employees possess a property interest in their job, guaranteed by statute, with attendant due process rights in their continued employment. *See Skelly v. State Personnel Bd.,* 1539 P.2d 774, 784 (Cal. 1975). That interest and the attendant rights are not lost upon termination but continue post-termination pending the final resolution of the administrative proceeding before the Personnel Board. *See id.* at 789; *see also* CAL. GOV'T CODE §§ 19575-78. The administrative process that will determine whether Freitag remains entitled to her job with the CDCR is pending, and thus her property interest and due process rights have not been extinguished. More important, at the time the district court issued the injunction, Freitag possessed a property interest in her job and thus possessed a sufficient connection to her employment with the prison to support the issuance of an injunction in her favor. We conclude, as did the district court, that she has standing to seek an injunction affecting the employment practices of the CDCR.

V

There was overwhelming evidence presented to the jury that the CDCR maintained a hostile work environment at Pelican Bay by failing to take prompt and reasonable corrective action with respect to Freitag's multiple

complaints regarding inmate exhibitionist masturbation directed at her and other female correctional officers. There was also overwhelming evidence that agents of the CDCR retaliated against Freitag as a result of those complaints. For these reasons, we affirm the jury's verdict with respect to the CDCR's liability under Title VII. However, due to an intervening Supreme Court decision, we remand for reconsideration of the jury's finding that Freitag's superiors retaliated against her in violation of her First Amendment rights in light of the instructional error regarding constitutionally protected speech. In this connection, we direct the district court to determine whether such error was harmless. Accordingly, we remand the damages award and attorneys' fees award as well. Because of insufficiency of the evidence, we reverse the § 1983 judgment against Lopez. Finally, we affirm the district court's grant of injunctive relief.

AFFIRMED IN PART, REVERSED IN PART, REMANDED IN PART.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEANNA L. FREITAG,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Defendants.

NO. C00-2278 TEH

ORDER DENYING IN PART AND VACATING IN PART DEFENDANTS' MOTIONS TO STRIKE; GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; AND GRANTING DEFENDANTS' MOTION TO AMEND ANSWER

(Filed Mar. 26, 2002)

These matters came before the Court on March 25, 2002, on Defendants' Motion for Summary Judgment and Defendants' Motion to Amend Answer. Defendants also moved to strike evidence presented by Plaintiff in opposition to the summary judgment motion.

For the reasons stated on the record in open court, IT IS HEREBY ORDERED that:

1. Defendants' Motions to Strike are DENIED IN PART and VACATED IN PART. The motions to strike based on Plaintiff's late filing and late serving are DENIED, as is the motion to strike the Rodman and Carmichael testimony. All other motions to strike are VACATED as moot because the Court did not rely on the contested evidence.

2. Defendants' Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART as follows:

a. The motion is DENIED as to Plaintiff's Title VII hostile work environment claim.

b. The motion is GRANTED IN PART and DENIED IN PART as to Plaintiff's Title VII retaliation claim. The motion is GRANTED to the extent that Plaintiff's claim is based on her negative performance evaluation or her termination. In all other respects, the motion is DENIED.

c. The motion is GRANTED IN PART and DENIED IN PART as to Plaintiff's Section 1983 claims. The motion is GRANTED as to Plaintiff's equal protection, privacy, and due process claims. It is DENIED as to her First Amendment retaliation claim.

d. The motion is GRANTED as to Plaintiff's Section 1985 claim.

Additionally, in light of Plaintiff's non-opposition,[1] Defendants' Motion to Amend Answer is GRANTED. Defendants shall file and serve their amended answer no later than April 5, 2002.

IT IS SO ORDERED.

DATED 3/25/02 /s/ Thelton E. Henderson
THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

[1] Plaintiff filed no written opposition to Defendants' Motion to Amend Answer and stated her non-opposition to this motion on the record at oral argument. Plaintiff is reminded that the Civil Local Rules require a party, where appropriate, to file a statement of non-opposition "within the time for filing and serving any opposition." Civ. L.R. 7-3(b).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEANNA L. FREITAG, Plaintiff, v. CALIFORNIA DEPARTMENT OF CORRECTIONS, et al., Defendants.	NO. C00-2278 TEH ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW (Filed Apr. 21, 2003)

This matter came before the Court on April 1, 2003, on Defendants' Motion for Judgment as a Matter of Law. Plaintiff alleges that (1) Defendant California Department of Corrections ("CDC") maintained a hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; (2) Defendant CDC unlawfully retaliated against Plaintiff in violation of Title VII; and (3) Defendants Robert Ayers, Jr., Teresa Schwartz, David Carmichael, Glen Rodman, Paul Dillard, Barry O'Neill, George Neotti, and Angie Lopez retaliated against Plaintiff's exercise of her First Amendment rights in violation of 42 U.S.C. § 1983. Defendants assert that, under Federal Rule of Civil Procedure 50, they are entitled to judgment as a matter of law on all of Plaintiff's claims.

Judgment as a matter of law is appropriate if, during the course of a trial, "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a). Because the standard for granting judgment as a matter of law under Rule 50 "mirrors" that for granting summary judgment under Rule 56, "the inquiry under each is the same." *Reeves v. Sanderson Plumbing*

Products, Inc., 530 U.S. 133, 150 (2000), *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986). The Supreme Court has described the analysis of a motion pursuant to Rule 50 as follows:

> [I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence . . . Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'

Reeves, 530 U.S. at 150-151 (citations omitted).

The Court has carefully considered the parties' oral arguments and reviewed the evidence in the record. Drawing all reasonable inferences in Plaintiff's favor, the Court is persuaded that there is a "legally sufficient evidentiary basis for a reasonable jury to find for [Plaintiff]" on her claims of sexual harassment and unlawful retaliation. *See* Fed. R. Civ. P. 50(a). Plaintiff has set forth evidence that she was subjected to inmate conduct of a sexual nature, that the conduct was unwelcome, and that the conduct was so "severe or pervasive [as] to alter the conditions of [her] employment and create an abusive work environment." *Gregory v. Widnall*, 153 F.3d 1071, 1074 (9th Cir. 1998). Furthermore, the jury has been given adequate evidence to conclude that Defendant CDC knew

or should have known of the inmates' behavior and failed to take prompt remedial action reasonably calculated to curb or end the harassment. *Mockler v. Multnomah County,* 140 F.3d 808, 812-813 (9th Cir. 1998).

With respect to her Title VII retaliation claim, Plaintiff has presented evidence establishing triable issues of fact as to whether she engaged in a protected activity and was subjected to an adverse employment action that was casually related to her protected activity. *Ray v. Henderson,* 217 F.3d 1234, 1240 (9th Cir. 2000). Finally, as to her § 1983 retaliation claim, the jury has before it sufficient evidence to conclude that Plaintiff took part in a protected activity that was a "substantial or motivating" factor for adverse actions subsequently taken against her by each of the individual Defendants. *Coszalter v. City of Salem,* 2003 U.S. App. LEXIS 2907, *10, 20 (9th Cir. 2003). Accordingly, Defendants' Motion for Judgment as a Matter of Law is DENIED in its entirety.

The Court is in receipt of Defendants' letter of April 15, 2003, regarding the effect the timing of this ruling may have on Defendants' legal rights. To alleviate Defendants' concerns, the Court hereby extends the date by which a proposed judgment is to be submitted to **April 28, 2003.**

IT IS SO ORDERED.

DATED 4/18/03 /s/ Thelton E. Henderson
THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEANNA L. FREITAG, Plaintiff, v. CALIFORNIA DEPARTMENT OF CORRECTIONS, ROBERT J. AYERS, JR., TERESA SCHWARTZ, DAVID A. CARMICHAEL, GLEN RODMAN, PAUL DILLARD, BARRY O'NEILL, GEORGE NEOTTI, and AUGIE LOPEZ, in their individual capacities, and DOES 1 through 15 inclusive, Defendants.	CASE NO. C00-2278 TEH **JUDGMENT** (Filed May 5, 2003) **ENTERED IN CIVIL DOCKET** 5/5/03

This action came on for trial before the Court and a jury, the Honorable Judge Thelton E. Henderson presiding, on March 4, 2003. A jury of eight was empaneled and sworn, witness were sworn and testified, physical and documentary evidence was introduced and admitted. Arguments of counsel were made and the jury of seven having been instructed by the Court in the law, and having rendered its unanimous Verdict on April 3, 2003, and good cause appearing thereof,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff Deanna L. Freitag was subjected to a sexually hostile work environment because of inmate sexual misconduct.

2. Defendant California Department of Corrections knew or should have known that Plaintiff Deanna L. Freitag was being subjected to inmate sexual misconduct and failed to take prompt and effective remedial action reasonably calculated to curb or stop the inmate sexual misconduct.

3. Defendant California Department of Corrections retaliated against Plaintiff Deanna L. Freitag because of her protected activity, i.e., her complaints about the sexually hostile environment or her complaints about CDC's response to the problem of inmate exhibitionist masturbation.

4. Defendants Robert Ayers, Jr., Teresa Schwartz and Augie Lopez retaliated against Plaintiff Deanna L. Freitag because of her protected activity, i.e., her complaints about the sexually hostile environment or

her complaints about CDC's response to the problem of inmate exhibitionist masturbation.

5. Plaintiff Deanna L. Freitag suffered actual injury, damage or harm as a result of the acts or omissions of Defendants.

6. Plaintiff Deanna L. Freitag is awarded compensatory damages as a result of the Defendants' acts or omissions in the following amounts;

Economic Loss:	$500,000
Non-Economic Loss:	$100,000

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

1. Defendant Robert Ayers' conduct toward Plaintiff Deanna L. Freitag was malicious or in reckless disregard of Plaintiff's rights, and Plaintiff is awarded $100.00 in punitive damages against Defendant Robert Ayers, Jr. in order to punish and make an example of him.

2. Defendant Teresa Schwartz conduct toward Plaintiff Deanna L. Freitag was malicious or in reckless disregard of Plaintiff's rights, and Plaintiff is awarded $100.00 in punitive damages against Defendant Teresa Schwartz in order to punish and make an example of her.

3. Defendant Augie Lopez' conduct toward Plaintiff Deanna L. Freitag was malicious or in reckless disregard of Plaintiff's rights, and Plaintiff is awarded $100.00 in punitive damages against Defendant Augie Lopez in order to punish and make an example of him.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Deanna L. Freitag shall have

and take nothing from Defendants David A. Carmichael, Glen Rodman. Paul Dillard, Barry O'Neill and George Neotti.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Deanna L. Freitag is the prevailing party herein, and shall be entitled to recover her costs of suit and reasonable attorneys' fees in an amount to be determined by the Court upon proper application therefor.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Deanna L. Freitag shall be entitled to recover prejudgment interest in an amount to be determined by the Court upon proper application therefor.

~~**IT IS FURTHER ORDERED, ADJUDGED AND DECREED that** Judgment may entered at this time without prejudice to Plaintiff's request for injunctive relief.~~ [TEH]

Dated 5/2/03

/s/ Thelton E. Henderson
HON. THELTON E. HENDERSON,
JUDGE
UNITED STATES DISTRICT
COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEANNA L. FREITAG, Plaintiff, v. CALIFORNIA DEPARTMENT OF CORRECTIONS, et al., Defendants.	NO. C00-2278 TEH ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW (Filed Aug. 11, 2003)

This matter came before the Court on July 21, 2003, on Defendants' Motion for Judgment as a Matter of Law. After careful consideration of the parties' written briefs and oral arguments, and good cause appearing, the Court DENIES Defendants' motion in its entirety for the reasons set forth below.

I. FACTUAL BACKGROUND

This case arises out of Plaintiff Deanna Freitag's employment as a correctional officer at Pelican Bay State Prison ("Pelican Bay") from January 1, 1996, until her dismissal on June 23, 2000. Plaintiff's allegations focus primarily on her assignment to the Security Housing Unit ("SHU"), where she claimed she was exposed to exhibitionist masturbation by a number of the SHU inmates. Plaintiff complained, both orally and in writing, to Pelican Bay administrators and other state officials about the failure of her supervisors to take reasonable steps to eliminate or reduce the frequency of the inmates' sexual misconduct. In her subsequent civil action, Plaintiff alleged that this failure to respond to her complaints resulted in the creation and maintenance of a sexually hostile work

environment. Plaintiff further alleged that, because of her complaints about the inmates' conduct, various adverse employment actions were taken against her, the most serious of which was her ultimate termination.

On March 4, 2003, Plaintiff proceeded to trial on three causes of action: (1) a claim of hostile work environment in violation of Title VII of the Civil Rights Act of 1964 against the California Department of Corrections ("CDC"); (2) a claim of retaliation in violation of Title VII against CDC; and (3) a claim under 42 U.S.C. § 1983 for retaliation in violation of her First Amendment right to free speech against Warden Robert Ayers, Jr., Associate Warden Teresa Schwartz, Investigative Services Unit Captain Paul Dillard, SHU Captain Barry O'Neill, SHU Lieutenant David Carmichael, SHU Sergeant Glen Rodman, Equal Employment Opportunity ("EEO") Coordinator Augustin Lopez, and Employment Relations Officer George Neotti. On April 2, 2003, the jury returned a verdict finding CDC liable for both hostile work environment and retaliation under Title VII. The jury further found Ayers, Schwartz, and Lopez liable under section 1983 for retaliation in violation of Plaintiff's First Amendment rights. Plaintiff was awarded $500,000 in economic damages and $100,000 in non-economic damages against all four defendants. Additionally, Plaintiff was awarded punitive damages in the amount of $100 each against Ayers, Schwartz, and Lopez. Judgment was entered to that effect on May 5, 2003.

II. LEGAL STANDARD

Judgment as a matter of law is appropriate if, during the course of a trial, "a party has been fully heard on an

issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). If the trial court does not grant a motion for judgment as a matter of law made at the close of the evidence, the moving party may renew its request by filing a motion no later than 10 days after the entry of judgment. Fed. R. Civ. P. 50(b).

Because the standard for granting judgment as a matter of law under Rule 50 "mirrors" that for granting summary judgment under Rule 56, "the inquiry under each is the same." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000), *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986). In considering a motion pursuant to Rule 50(a), the district court must "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150; *see* 9A Wright & Miller, *Federal Practice & Procedure* § 2524 at 255-56 (1995) (stating that a district court entertaining a motion for judgment as a matter of law may not weigh the evidence, assess the credibility of witnesses, or substitute its judgment for that of the jury); *see also Honeywell, Inc. v. San Francisco Housing Authority*, 164 F. Supp. 2d 1130, 1135 (N.D. Cal. 2001) (observing that "where the evidence permits of conflicting inferences, the court is not at liberty to select an inference over one chosen by the jury").

Judgment as a matter of law may be granted "when the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, which is contrary to the jury's verdict." *Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1161 (9th Cir. 1997); *see Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 644

(9th Cir. 1993) (explaining that a district court "must determine whether the evidence, considered as a whole and viewed in the light most favorable to the nonmoving party, reasonably can support *only* verdict for the moving party") (emphasis in original) (internal quotations and citation omitted). Judgment as a matter of law is improper if reasonable minds could differ over the propriety of the verdict. *Venegas v. Wagner,* 831 F.2d 1514, 1517 (9th Cir. 1987). A district court's ruling on a motion for judgment as a matter of law under Rule 50(a) is reviewed *de novo* by the appellate court. *Omega Environmental,* 127 F.3d at 1161.

III. DISCUSSION

Defendants CDC, Ayers, Schwartz, and Lopez move for judgment as a matter of law on four grounds: (1) Plaintiff cannot state a claim for hostile work environment against CDC under Title VII; (2) flaws in the verdict form invalidate the judgment against CDC for retaliation in violation of Title VII; (3) the Court's grant of partial summary judgment for CDC on Plaintiff's Title VII retaliation claim precludes a finding of liability under section 1983 against Ayers, Schwartz, and Lopez for Plaintiff's termination; and (4) the award of punitive damages against Ayers, Schwartz, and Lopez is not supported by substantial evidence. The Court will address each of these arguments in turn.

A. Title VII Hostile Work Environment Claim Against CDC

Defendants first assert that judgment as a matter of law should be granted in CDC's favor because Plaintiff's

hostile work environment claim does not state a cause of action upon which relief may be granted under Title VII. Specifically, they argue that a prison cannot be held liable for the sexual misconduct of its inmates.

Contrary to Defendants' assertions, the Ninth Circuit has recognized that an employer made be held liable under Title VII for the sexually harassing conduct of a non-employee. *Little v. Windermere Relocation, Inc.,* 301 F.3d 958, 968 (9th Cir. 2001); *Folkerson v. Circus Circus Enterprises, Inc.,* 107 F.3d 754, 756 (9th Cir. 1997). When evaluating such a claim, a court must make two inquiries: (1) whether the plaintiff has demonstrated that she was subjected to a hostile work environment; and (2) whether the employer is liable for the harassment that created the sexually hostile environment. *Little,* 301 F.3d at 966.

1. Plaintiff's Exposure to a Hostile Work Environment

To prevail on a hostile work environment claim under Title VII, a plaintiff must prove that: (1) she was subjected to verbal or physical conduct of a sexual nature; (2) this conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment. *Ellison v. Brady,* 924 F.2d 872, 875-76 (9th Cir. 1991). The plaintiff's working environment must be both subjectively and objectively abusive. *Fuller v. City of Oakland,* 47 F.3d 1523, 1527 (9th Cir. 1995). In a case involving a female plaintiff, the objective component of the claim is evaluated from the perspective of a reasonable woman. *Ellison,* 924 F.2d at 879. The determination of whether an environment is sufficiently hostile or abusive

under Title VII is a fact-specific inquiry, and a court is to look to "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Clark County School District v. Breeden,* 532 U.S. 268, 270-71 (2001) (citations omitted). Hostile conduct is actionable if it "pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position." *Steiner v. Showboat Operating Co.,* 25 F.3d 1459, 1463 (9th Cir. 1994).

The basis on which Defendants mount a challenge to the jury's finding that Plaintiff was subjected to a hostile work environment during her time as a correctional officer at Pelican Bay is unclear.[1] There can be no dispute that, on numerous occasions, inmates in the SHU exposed themselves to Plaintiff and masturbated in her presence. Plaintiff did not welcome this misconduct in any way. Plaintiff offered detailed testimony regarding the detrimental effect the inmates' behavior had on her working environment, a perception that, given the frequency with which Plaintiff was subjected to the inmates' conduct and of its humiliating nature, undoubtedly is consistent with

[1] In their Reply, Defendants suggest that Plaintiff failed to prove that the inmate exhibitionist masturbation disproportionately affected female correctional officers in the SHU, a proposition for which they cite *Turnbull v. Topeka State Hospital,* 255 F.3d 1238 1243-44 (10th Cir. 2001). As the Court's articulation of the applicable standard for hostile work environment indicates, this is not a burden that Plaintiff must meet as part of her prima facie case. This issue is discussed in greater detail in Section III.A.2 of the Court's Order Denying Defendants' Motion for New Trial.

that of a reasonable female correctional officer. In light of the evidence presented at trial, Defendants have not demonstrated that the jury's finding that Plaintiff was subjected to a sexually hostile work environment should be disturbed.

2. CDC's Liability for the Hostile Work Environment

The Court must next determine whether CDC can be held liable for a sexually hostile work environment created by the misconduct of the inmates in the SHU. In the Ninth Circuit, "employers are liable for harassing conduct by non-employees 'where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.'" *Little,* 301 F.3d at 968, *quoting Folkerson,* 107 F.3d at 756. This approach is endorsed by the Equal Employment Opportunity Commission's guidelines on sexual harassment, which state: "An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action." 29 C.F.R. § 1604.11(e) (2003). An employer's remedial measures must be "reasonably calculated to end the harassment" and "assessed proportionately to the seriousness of the offense." *Ellison,* 924 F.2d at 882 (citations omitted). The effectiveness of an employer's responsive action is evaluated according to the dual goals of "ending the current harassment and deterring future harassment." *Fuller,* 47 F.3d at 1528. An employer will be held liable if

either no remedial action is taken or the remedy attempted is ineffective. *Id.* at 1528-29.

The Ninth Circuit's decision in *Little v. Windermere Relocation, Inc.* is instructive on this issue. There, a female manager of a relocation company filed a Title VII action against her employer after she was raped by a client. The court noted that, before the assault, the plaintiff was pressured to obtain the client's account; that she was advised not to report the incident; that she was not immediately removed from the account; and that no steps were taken to prevent future contact between the plaintiff and her attacker. *Little,* 301 F.3d at 968-69. The Ninth Circuit reversed the district court's order granting summary judgment for the defendant, finding that the plaintiff had produced evidence showing that her employer failed to take appropriate remedial measures to address the sexually hostile work environment. *Little,* 301 F.3d at 969; *cf. Folkerson,* 107 F.3d at 756 (stating that a casino may be held liable for harassment of an employee by a patron, but holding that the plaintiff did not present sufficient evidence demonstrating that the casino failed to take remedial actions to address the misconduct).

The cases Defendants cite do not alter the conclusion that CDC can be held liable for failing to adequately respond to the sexually hostile work environment to which Plaintiff was exposed at Pelican Bay. Notably, these cases consistently hold that the imposition of liability is based not on the harassing conduct itself, but on the employer's response to that conduct. In *Turnbull v. Topeka State Hospital,* a psychologist at a state mental hospital brought suit under Title VII against her employer and the state of Kansas after she was attacked by a patient. The Tenth Circuit reversed the district court's grant of judgment as a

matter of law for the defendants on the plaintiff's hostile work environment claim, concluding that the plaintiff had produced sufficient evidence that the hospital's preventative measures were not reasonable under the circumstances. *Turnbull,* 255 F.3d at 1245. Similarly, in *Slayton v. Ohio Dept. of Youth Services,* 206 F.3d 669 (6th Cir. 2000), the plaintiff, a female correctional officer at a maximum security juvenile facility, alleged that the conduct of the inmates, coupled with the behavior of a co-worker, created a sexually hostile work environment. The Sixth Circuit held that the prison's failure to take adequate remedial measures, coupled with another officer's encouragement of the inmates, allowed for the attribution of the sexual harassment to the plaintiff's employer. *Id.* at 678. Consequently, the district court's denial of the defendant's motion for a new trial was affirmed. *Id.* at 680.

In the remaining cases upon which Defendants rely, judgment in favor of the employers was granted not because the plaintiffs were legally precluded from seeking relief under Title VII for the actions of non-employees, but because the plaintiffs did not set forth evidence that their employers failed to take prompt, effective action to remedy the allegedly hostile work environments. *See Waymire v. Harris County,* 86 F.3d 424, 428 (5th Cir. 1996) (concluding that no rational juror could find that a prison failed to take adequate remedial action in response to an inmate's sexual harassment of a female prison guard); *Powell v. Morris,* 37 F. Supp. 2d 1011, 1017 (S.D. Ohio 1999) (finding that, in an action brought by a secretary at a medium security prison who was allegedly harassed by an inmate, the defendant "implement[ed] and enforce[d] policies reasonably calculated to minimize [sexual] harassment and protect the safety of its employees"); *Hicks v. Alabama,* 45

F. Supp. 2d 921, 931, 933 (S.D. Ala. 1998) (finding, in a hostile work environment claim asserted by female prison guards who were subjected to masturbation by inmates, that the plaintiffs failed to identify measures that the defendant could have utilized to address the misconduct).

Finally, Defendants suggest that the cases holding that a plaintiff may seek relief under Title VII for an employer's failure to take corrective action designed to curtail harassment by non-employees are not applicable in this instance. Defendants point to the "unique nature of the prison environment and the types of inmates therein housed." Defs.' Mot. for J. as a Matter of Law at 7-8. Defendants also seem to believe that correctional officers somehow assume the risk of working in a sexually hostile environment when they choose to become part of the prison staff.

This unpersuasive argument can be summarily dismissed. As the previous discussion indicates, cases addressing sexual harassment in prisons or in similar contexts have expressly stated that Title VII imposes liability on those sorts of employers if they fail to take appropriate remedial action.[2] The Eighth Circuit addressed a similar

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[2] Illustrative of Defendants' tendency to mischaracterize the relevant case law is their treatment of *Powell,* from which they quote the following passage:

> The propensity of courts to decline imposing liability for prisoner acts is based on solid logical and practical foundations: anyone who works at a prison, particularly in a position with frequent inmate contact, must expect some off-color interactions. Prison employees inherently assume the risk of some rude inmates. It is absurd to expect that a prison can actually stop all obscene comments and conduct from its inmates – people who have been deemed unsuited to live in normal society.

(Continued on following page)

situation in *Crist v. Focus Homes, Inc.,* 122 F.3d 1107 (8th Cir. 1997), an Title VII action brought by employees of a residential care facility for developmentally disabled individuals regarding the sexual misconduct of a resident. In holding for the plaintiffs, the court disagreed that the defendant could not be held responsible because it was unable to control the resident's behavior, and rejected the idea that the defendant could effectively tell its employees that they assumed the risk of working with the disabled and had no right to expect a safe working environment. *Id.* at 1110. Like the defendant in *Crist,* CDC "clearly controlled the environment in which [the inmates] resided, and it had the ability to alter those conditions to a substantial degree." *Id.* at 1112. *Crist* and other cited cases lead inexorably to the conclusion that "[e]ven in an inherently dangerous working environment, the focus remains on whether the employer took reasonable measures to make the workplace as safe as possible." *Turnbull,* 255 F.3d at 1245.

Based on Plaintiff's numerous complaints and reports describing the situation, as well as on the pervasiveness of the exhibitionist masturbation problem, there is little doubt that CDC had notice of the SHU inmates' sexual misconduct. *See EEOC v. Hacienda Hotel,* 881 F.2d 1504, 1515-16 (9th Cir. 1989). The jury was presented with

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Powell, 37 F. Supp. 2d at 1017. However, Defendants fail to include the last sentence of the court's statement in their brief: "*The most we can expect and require prisons to do is to implement and enforce policies reasonably calculated to minimize such harassment and protect the safety of its employees.*" *Id.* (emphasis added). The addition of this sentence significantly changes the passage's meaning, and lends support for the proposition that a prison can be held liable for the misconduct of its inmates.

testimony from various Pelican Bay employees and, notably, from Plaintiff's prison management expert and a deputy inspector general, from which it could have reasonably concluded that CDC acquiesced in the sexual harassment by failing to take prompt remedial action. There was also evidence that, to the extent CDC did attempt responsive measures, they neither ended the harassment with which Plaintiff was regularly confronted, nor deterred other inmates from engaging in similar behavior in the future. Accordingly, the Court will not set aside the jury's verdict imposing liability on CDC for the maintenance of a sexually hostile work environment in violation of Title VII.

B. Title VII Retaliation Claim Against CDC

Defendants next contend that flaws in the verdict form submitted to the jury demand that CDC be granted judgment as a matter of law on the Title VII retaliation claim.[3] Defendants point to two shortcomings in the verdict form: (1) the jury was not required to specify the precise adverse employment actions taken by each defendant; and (2) the jury was not asked to apportion the total amount of compensatory damages among the nine defendants or the three causes of action. In light of the deferential standard under which this motion must be considered, and for the reasons stated in Section III.B of this Court's Order Denying Defendants' Motion for New Trial, Defendants have not presented good cause to invalidate the

[3] As Plaintiff notes, Defendants do *not* argue that the jury's finding of liability against CDC for retaliation in violation of Title VII is erroneous as a matter of law or not supported by the evidence. Defendants rely solely on the purported errors in the form of verdict.

jury's finding that CDC is liable for retaliation under Title VII.

C. Section 1983 Retaliation Claim Against Ayers, Schwartz, and Lopez

Defendants attack the jury's finding that Ayers, Schwartz, and Lopez are liable for unlawfully retaliating against Plaintiff's exercise of her First Amendment rights. Defendants base their argument on this Court's March 26, 2002 order, in which it granted summary judgment for Defendants on Plaintiff's Title VII retaliation cause of action against CDC to the extent that the claim was based on Plaintiff's termination. Defendants reason that the Court's ruling as to the Title VII cause of action somehow precludes a finding that any of the individual defendants are liable for retaliation under section 1983.

For several reasons, none of which require a lengthy discussion, Defendants' argument that they are entitled to judgment as a matter of law on Plaintiff's section 1983 cause of action must be rejected. First, all that can be gleaned from the Court's previous ruling is that Plaintiff failed to meet her burden as to a portion of her Title VII retaliation claim at the summary judgment stage. At trial, however, Plaintiff introduced evidence on which the jury could have reasonably concluded that Ayers, Schwartz, and Lopez violated her First Amendment rights. Second, the standard a plaintiff must meet to prove a prima facie case of retaliation under Title VII is slightly different than that she must satisfy to show retaliation under section 1983. *Compare Ray v. Henderson,* 217 F.3d 1234, 1240 (9th Cir. 2000) *with Coszalter v. City of Salem,* 320 F.3d 968, 973 (9th Cir. 2003); *see Allen v. Iranon,* 283 F.3d 1070,

1074 (9th Cir. 2002) (concluding that the more defendant-friendly Title VII burden-shifting analysis is not applied to a First Amendment retaliation claim). Finally, Defendants do not even attempt to demonstrate that the Court may properly apply either the doctrine of res judicata, *see Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 322 F.3d 1064, 1077 (9th Cir. 2003), or the doctrine of collateral estoppel, *see In re Palmer,* 207 F.3d 566, 568 (9th Cir. 2000), in this instance.

In sum, Defendants have not established that the Court's summary judgment ruling entitles them to judgment as a matter of law on Plaintiff's section 1983 cause of action for First Amendment retaliation.

D. Award of Punitive Damages Against Ayers, Schwartz, and Lopez

Defendants assert that there is insufficient evidence on which the jury could lawfully base its award of punitive damages against Ayers, Schwartz, and Lopez. For the reasons set forth in Section III.E of this Court's Order Denying Defendants' Motion for New Trial, the Court concludes that, when all inferences are drawn in Plaintiff's favor, the jury could reasonably have found that the retaliatory actions of Ayers, Schwartz, and Lopez were motivated by ill will or involved reckless indifference to Plaintiff's federally protected rights. Thus, Defendants' argument must be rejected.

IV. CONCLUSION

As the Court has explained, Defendants have not met their burden of demonstrating that, when viewed in the light most favorable to Plaintiff, the evidence can only

support a verdict in their favor. *See Baker,* 6 F.3d at 644. Accordingly, Defendants' Motion for Judgment as a Matter of Law is DENIED.

IT IS SO ORDERED.

DATED 8/6/03 /s/ Thelton E. Henderson
THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEANNA FREITAG, Plaintiff, v. CALIFORNIA DEPARTMENT OF CORRECTIONS, et al., Defendants.	) NO. C00-2278 T.E.H.)) SPECIAL MASTER'S FINAL REPORT RE ADEQUACY OF PELICAN BAY STATE PRISON REMEDIAL PLAN RE INMATE EXHIBITIONIST MASTURBATION)) (Filed May 14, 2004)

I.

INTRODUCTION

On August 18, 2003 the Court granted in part and denied in part plaintiff's motion to amend the judgment in this case to include permanent relief. The Court referred the development of a remedial plan to address the problem of inmate exhibitionist masturbation to Special Master John Hagar and the *Madrid v. Gomez* team.

II.

THE SPECIAL MASTER'S ATTEMPTS TO WORK WITH THE PARTIES TO DEVELOP AN ADEQUATE REMEDIAL PLAN TO ADDRESS INMATE EXHIBITIONIST MASTURBATION

A. Meetings With Counsel Between August 2003 and January 6, 2004.

The Special Master began his work with the parties to develop a remedial plan for Pelican Bay State Prison "PBSP" by meeting with counsel for the parties in *Freitag*.

The initial meeting involved counsel for Deanna Freitag ("Freitag") only, because counsel for defendants did not want to confer with the Special Master until after the California Department of Corrections ("CDC") made the decision whether the Department would appeal the order of August 18, 2003.

Discussions with plaintiff's counsel proved important. Information was obtained concerning which remedial efforts would be necessary from the perspective of the correctional staff offended by inmate exhibitionist masturbation. In addition, plaintiff's counsel explained the purpose behind the specific orders they sought in their motion for an injunction. The Special Master met with the attorneys for the defendants at a later date, including lawyers from the Office of the Attorney General in Sacramento and San Francisco and lawyers from CDC Legal Affairs. This meeting was also important in that the Special Master was informed the Department of Corrections intended to utilize the policy developed for PBSP at other CDC institutions. Thus, at the request of the CDC's Central Office and their attorneys, the Special Master allowed defendants to take longer than necessary to develop the PBSP plan based on assurances that the inmate exhibitionist remedial plan will be implemented in a timely manner "state-wide."

During the Fall and Winter of 2003 the Special Master also met with counsel in the *Madrid* litigation to discuss the inmate exhibitionist remedial plan. Prisoner housing units were inspected, including the Security Housing Unit ("SHU") and the Psychiatric Services Unit ("PSU"), as were proposed cell-front covers.

B. Meetings With PBSP Officials Before January 6, 2004.

The Special Master also met and conferred with PBSP officials on numerous occasions between August 2003 and January 2004 to discuss the requirements of an adequate plan to control inmate exhibitionist masturbation. Most of these meetings took place when the Special Master was at the prison. For example, the Special Master conducted meetings with Warden Joe McGrath, Associate Warden Robert Horrel, the Captains of the PSU and SHU, Dr. Wendy Saville, and Dr. Ted Ruggles. He also conducted inspections of the SHU and PSU without counsel. As part of the development of the remedial plan the Special Master reviewed numerous draft versions of proposed policies and grievance forms and held several telephone conferences with PBSP officials. He was also provided with memoranda concerning the number of inmates in each type of housing unit who have engaged in exhibitionist masturbation on more than two occasions, inmate discipline reports, staff grievances (including suggestions from staff about how the remedial plan could or should be implemented without compromising correctional officer safety).

The Special Master found the cooperation from PBSP officials to be excellent. Discussions were candid, the information requested was promptly provided, and staff at all levels at the prison were anxious to consider the advice offered by the Special Master and the Court's experts. In contrast to the response to the Court's Order of August 18, 2003 from Pelican Bay State Prison, the CDC's Central Office did not, between August 2003 and January 6, 2004, cooperate in timely fashion to address the problem concerning inmate exhibitionist masturbation. Repeatedly,

the Central Office submitted untimely and incomplete corrective action submissions, as explained in Exhibit 1.

C. Participation By the Court Appointed Experts in the Remedial Process Between August 18, 2003 and January 6, 2004.

Dr. Patrick Maher has been involved, in the past, with use of force related issues concerning inmates who expose themselves to female correctional officers and clinicians. The Special Master also consulted with Dr. Maher concerning the cell-front aspects of defendants proposed plan. Dr. Jeffrey L. Metzner has worked closely with the Special Master throughout the remedial process. Dr. Metzner participated in the *Madrid* meetings concerning the need to identify those exhibitionists who engage in such behavior because of a serious mental illness. During the past ten months Dr. Metzner also reviewed and provided comments to the mental health components of defendants' proposed remedial plan.

D. The Special Master's Initial Draft Report Served January 6, 2004.

The Special Master issued his initial draft report of findings and recommendations re defendants' proposed remedial plan to address the problem of inmate exhibitionist masturbation on January 6, 2004 (Exhibit 1). Freitag, *Madrid* plaintiffs, and the defendants in *Madrid* and *Freitag* submitted objections to the draft report (Exhibits 2-4). The Special Master conducted an informal meeting in the Judges' Robing Room on Thursday, February 5, 2004. The meeting lasted approximately three hours, from 9:00 a.m. until approximately 12:00 noon. Counsel for the

plaintiffs in *Freitag* and *Madrid* attended, as did the Deputy Attorney Generals for both the *Freitag* and *Madrid* defendants, two lawyers from the CDC's Legal Affairs Unit, the Warden of Pelican Bay, the PSU Captain at Pelican Bay, the Employment Relations Officer and Litigation Coordinator from Pelican Bay, and numerous high ranking custody and Health Services officials from the CDC's Central Office, including Rosanne Campbell and Dr. Tim Fishback.

Significant progress was made. Discussions between the parties led to increased understanding of the concerns of both sets of plaintiffs and of the Department of Corrections. In addition, some progress was made toward resolving disputes about the adequacy, or lack of adequacy of the proposed Pelican Bay policy to deal with inmate exhibitionist masturbation. Serious disputes continued, however, and questions of fact were raised that, in the opinion of the Special Master, warranted further examination. In addition, the January 2004 Central Office submission concerning the mental health screening of inmates with exhibitionist behavior was inadequate. The Central Office had also failed to submit a proposed policy to treat inmates after the mental health screening found evidence that exhibitionist conduct was caused, at least in part, by a mental health disorder.

Therefore, the Special Master made the decision to conduct additional inquires into certain aspects of the inmate exhibitionist masturbation issue, to work further with Court expert Dr. Jeffrey L. Metzner and Central Office staff concerning the requisite mental health screening and treatment policies. Only after this effort, did the Special Master prepare a second draft report for review by the parties.

E. The Special Master's Efforts to Address Disputes Between the Parties From February 6, 2004 until March 19, 2004.

The Special Master's efforts to further reduce the disputes between the parties, and to work with defendants to develop a more effective remedial plan can be summarized as follows:

1. The Special Master traveled to PBSP to attend the February 2004 meeting of the new committee of PBSP officials who review, comment upon, and take corrective action concerning all reported incidents of inmate exhibitionist masturbation – the Indecent Exposure Review Committee ("IERC"). This meeting was especially informative. It is apparent to the Special Master that the prison is taking its corrective action responsibilities seriously.

2. The Special Master conducted a telephone conference with Mike Riese, the District Attorney of Del Norte County to discuss how the limited resources of his Office, and the referral practices of PBSP, may have an adverse impact on his ability to prosecute critical indecent exposure criminal cases.

3. The Special Master conferred with Dr. Metzner on numerous occasions concerning the development by defendants of their revised mental health screening and treatment policies.

4. The Special Master reviewed ten different proposed inmate exhibitionist masturbation related polices or attachments submitted by defendants on February 20, 2004. After this evaluation, the Special Master determined that the remedial process would not proceed forward in a timely and appropriate fashion given the shortcoming with

some of the submissions. For example, the PBSP Plan for Management of Indecent Exposure Incidents, which required only a few minor modifications after the February 5, 2004 meeting, was changed in ways not discussed between the parties. Likewise, the Procedure for Clinical Assessment of Inmate Indecent Exposure by the Mental Health Department had been re-written so many times that it evolved into a lengthy, disorganized document that confused treatment with assessment to a degree which rendered it difficult to utilize as an operational policy in a high security prison.

5. Because of these problems, the Special Master re-wrote portions of the Plan for Management of Indecent Exposure Incidents, the Lesson Plan: Management of Inmate Indecent Exposure, the Procedure for Clinical Assessment of Inmate Indecent Exposure by the Mental Health Department, the Mental Health Policy Re Treatment of Inmates With Exhibitionism, and an attachment to the Clinical Assessment Procedure.

On Friday, March 12, 2004 the Special Master e-mailed his revisions to Warden Joe McGrath, who was working in CDC's Central Office on a special assignment. On Tuesday, March 16, 2004 the Special Master met with Director Woodford, Mr. McGrath, Attorney Kathy Keeshen, and Dr. Tim Fishback to discuss the proposed modifications. The meeting was productive and agreement was reached concerning updated versions for all procedures. The modified policies are attached to this report and will be referenced below.

F. The Special Master's Second Draft Report and the Meeting of May 7, 2004.

The Special Master served his Second Draft Report on the parties on March 27, 2004. Freitag's objections are attached as Exhibit 15, the *Madrid* plaintiffs' objections are attached as Exhibit 16, and defendants' objections are attached as Exhibit 17. A meeting was held to discuss the draft report on May 7, 2004 in Courtroom 12. As with the prior meeting, the attorneys for the parties and officials from both Pelican Bay and the CDC's Central Office attended that meeting.

The parties' concerns and objections deserve comment and will be discussed below:

1. *Freitag's Comments*: Freitag raised three objections to the second draft report. First, she requests the Court impose "staff sanctions" in the event that prison disciplinary policies are not enforced in a timely and adequate manner. The Special Master disagrees with this proposal for several reasons, including:

a. The corrective action plan described below provides for regular reporting and monitoring of exhibitionist related inmate discipline. In addition, the adequacy of discipline will be reported to the Warden by the IERC.

b. The IERC reports will be provided to the Special Master and counsel as part of the monitoring plan. Thus, the Special Master can inform the Court if the inmate discipline system is not working appropriately, and the Warden will be held accountable for necessary corrective action. Furthermore, counsel for the parties can closely monitor the timeliness and adequacy of inmate discipline relative to indecent exposure cases.

c. Given a. and b. above, Federal Court orders that mandate sanctions for managers who fail to control inmate discipline is, at this stage of the remedial process, unduly intrusive.

Freitag's other two comments, requests to review various policies and procedures that will be submitted by the defendants have merit, and the Special Master has modified his final report to provide for such review by the plaintiffs.

2. *Madrid Plaintiffs' Comments and Objectives*: The *Madrid* Plaintiffs raise two concerns. First, *Madrid* plaintiffs request that the Special Master add the *Madrid* caption to his final report, and file his report in both the *Freitag* and *Madrid* cases. The Special Master disagrees with this proposal, he was appointed under *Freitag* to develop a remedy concerning the inmate exhibitionist problem. While the Court instructed the Special Master to work on the *Freitag* remedy in conjunction with the *Madrid* team, authority was not conferred on the Special Master to combine the two cases. In making this decision, the Special Master also notes the following:

a. The Special Master presumes that the plaintiffs in *Madrid* will submit their objections, if any, to the Special Master's final report in *Freitag* without having to formally intervene in *Freitag*. The Order of August 18, 2004 called for participation by the *Madrid* team. Such participation implies the right to object to the Special Master's final reports.

b. While the Special Master recommends that the Court consider issuing its remedial orders under both a *Freitag* and *Madrid* caption, the decision to do so requires careful review. For example, the mental health

screening and treatment called for in this report are required, in the opinion of the Special Master, primarily because of Title VII concerns. The use of the *Madrid* caption should not be interpreted as a ruling that defendants' proposed remedial plan raises proof of an Eighth Amendment violation. The Special Master anticipates that the Court will receive additional briefing from the parties concerning this issue.

The *Madrid* plaintiffs also raised several concerns that, in their opinion, render defendants' remedial plan inadequate. The Special Master has considered each concern raised by the *Madrid* plaintiffs and finds them unconvincing.

a. *Dr. Metzner*: The *Madrid* plaintiffs understand that Dr. Metzner was involved in the preparation of defendants plan (he approved that plan). However, they expected a written report from Dr. Metzner. The Court expert will report upon compliance, it is not necessary for him to issue reports concerning his participation in remedial plan development. Furthermore, counsel's desire for a report in no way justifies delaying the remedial plan, counsel for the parties may, at their request, jointly confer with Dr. Metzner at their convenience.

b. *Interface with Coleman*: The *Madrid* plaintiffs also imply (see page 2 of exhibit 16, final paragraph: "it is unclear") the possibility of *Coleman* related concerns. Dr. Metzner, however, is the *Coleman* expert for PBSP. He would not have approved the plan if it conflicted with Coleman. In addition, the Special Master has had a series of discussions with Michael Keating, the Special Master in *Coleman,* about the mental health screening and treatment issues raised by *Freitag.* There is no conflict between

the various remedial plans and there is no reason to further delay the correction of a serious problem at PBSP.

c. *Use of Lexan Cell Covers*: The *Madrid* plaintiffs' also express concern about a case where PBSP clinicians determined that an inmate was experiencing suicidal ideation behind a lexan cell cover. The prisoner was moved to a different cell, provided mental health intervention, the problem referred to a Quality Improvement Team, and carefully documented. At the meeting of May 7, 2004 the Chief Psychiatrist at PBSP reported no additional incidents of this nature. In addition, the Acting Warden reported that a long-standing budget request to replace all of the celled doors in the PSU with solid doors have finally been approved and the change-over is beginning. Thus, all PSU inmates will soon be confined behind a solid door with a window the same size as the window on the lexan door used to confine exhibitionists.

The interface between discipline and treatment for inmates with serious mental illnesses presents constant challenges. Defendants must impose discipline to ensure inmate accountability, but at the same time they must remain watchful concerning those cases where the imposition of a sanction might create depression or suicidal ideation. It is difficult to justify delaying the implementation of this adequate remedial plan, however, because of a case where PBSP clinicians recognized a mental health problem, responded appropriately, established a team to determine if a systemic issue had arisen, and documented the process. In this regard, it must also be emphasized that *Madrid* monitoring concerning almost all aspects of mental health care at the prison has ceased.

Two additional factors cause the Special Master to disagree with the *Madrid* plaintiffs' objections. Defendants implemented most of the correctional elements of the remedial plan that is the subject of this report in late 2003. They now have several months of experience, changes to initial versions of the plan have been implemented, and they are slowly accumulating the statistical data needed to fine tune this corrective action. Given all of this, provisional approval is not warranted. Finally, as explained below, the proposed remedial plan will evolve and change. Plaintiffs will have the opportunity to comment upon and ensure the adequacy of the additional policies and procedures, and comment upon proposed changes. Simply stated, there is no reason to further delay the full implementation of defendants' proposed remedial plan.

Defendants' Comments and Objections: Defendants raise numerous objections in Exhibit 17. First, they impose a general objection (to preserve appeal rights) concerning any injunctive relief. Second, during the meeting of May 7th defendants emphasized their concern about injunctive relief that involved inmate mental health care. The Special Master will not set forth legal arguments concerning the scope of Title VII relief, that is an issue which will be addressed by the Court in its review of this report and recommendations.

Looking at the realities of prison operations, however, the Special Master has determined, that the assessment and treatment of the small number of prisoners who expose themselves to staff based on a mental illness must be part of defendants' plan for it be an adequate plan. Defendants admit that inmates are causing the problem that led to this litigation. After trial and the verdict, they

agreed to correct the situations described at trial, even while perfecting their appeal. No one among the clinicians, including the clinicians who work for the CDC, dispute the fact that some percentage of the inmate offenders expose themselves, perhaps compulsively, do so because of a mental disorder. Furthermore, it appears that normal prison sanctions are not effective in curbing or stopping the exhibitionism of inmates who expose themselves because of a mental health disorder. Thus, the problem will not be solved, at least concerning some portion of the offenders, unless they are screened (to determine if the exhibitionism is caused by a mental illness) and treated (to prevent or delay recidivism of future exhibitionism to staff).

In making this determination, the record should reflect the focused and limited nature of the mental health screening and treatment that has been approved by Court expert Dr. Jeffrey L. Metzner and the Special Master. Only those inmates who expose themselves to staff will be screened. In other words, the CDC is not creating any new mental health program for exhibitionists. The screen will evaluate for those disorders that are treated in the CDC, the major and serious mental illnesses that comprise the *Madrid* and *Coleman* remedial plans, and when appropriate, an evaluation will be conducted for the presence of Exhibitionism. The percentage of inmates who expose themselves to staff is quite small, those who do so because of a mental illness is anticipated to be a small percentage of that number. Of this very small group, it is anticipated, although no one knows for certain, that a significant percentage will refuse treatment – consistent with their prior denials of problem. For the few prisoners who remain, treatment will be provided that addresses their

"in-prison exhibitionism," the remedial plan does not provide long term therapy for all sexual dysfunctions that the prisoner may present.

Thus, the proposed plan, the screening portion which has just begun, and the treatment portion that has not yet started, have been carefully tailored to correct the Title VII problem that is at issue in this case, and not to do more. The screening, evaluation, treatment plan was developed by defendants, with assistance from Dr. Metzner. Furthermore, the plan serves to increase prison security, and provides a more suitable environment for female officers. Finally, it gives those inmates who habitually expose themselves because of a mental disorder a treatment option that may help them avoid the punishment, segregation, and stigma attached to being a sex offender in prison.

Defendants also object to allowing counsel for Freitag to engage in the monitoring proposed by the Special Master, and suggest that the mental health aspects of the remedial plan are better suited for *Madrid* or *Coleman*. The Special Master disagrees, as explained in paragraph III. A. 6 at pages 15-16 below.

Defendants object to the time limitations imposed in the draft report re CPOST approval of proposed training programs. After discussion at the meeting of May 7th, the Special Master finds this objection to have merit. He has modified his recommendation accordingly.

Finally, defendants express concern about the Special Master's recommendation that copies of this report, the Court's Order of August 18, 2003, and the Court's Orders pertaining to this report be posted in the inmate law libraries. Specifically, defendants raise two different

concerns about posting in the inmate law libraries. First, defendants argue that "the court's August 18 order summarizes competing arguments of counsel and the court's thought processes, none of which prison inmates have a need or reason to see." The Special Master disagrees. The proposed *Freitag* remedial plan will impact on all PBSP inmates, no legitimate correctional purpose is achieved by keeping them in the dark concerning how the remedial orders came about. In addition, the recommendations here were developed in part by the *Madrid* Team, and similar to all other remedial plans, *Madrid* class members should have access to the public record in their inmate law library. Therefore, prisoners at PBSP should be provided access to the important pleadings; indeed, once the range of sanctions becomes well known among the inmates, this knowledge may assist prison officials in implementing their plan.

Defendants also contend that the attachments to the Special Master's report "are subject to a stipulated protective order limiting access to the parties, and their counsel and experts." The Special Master disagrees. The protective order does not limit the Special Master's ability to file documents with the Court. All filed documents, documents that become part of the public record, are outside the protective order (Protective Order, page 2, lines 3-6). While no security concerns appear to be presented by the filing of these documents, the Special Master has modified his posting recommendation to allow the Warden at PBSP to raise objections to filing of selected exhibits in the law library if he believes prison security will be jeopardized, consistent with the practice utilized in the *Madrid* litigation.

III.

GENERAL FINDINGS RELEVANT TO THE REMEDIAL PROCESS

A. Introduction.

Numerous issues arose during the lengthy remedial process that required the Special Master to make decisions which impact upon the scope of defendants' remedial plan. In some cases, these issues were the source of disputes between the parties. In other cases, the issues involved interpretation of the Court's Order of Reference of August 18, 2003, or questions about the scope of prisoner services required to correct the problem of inmate exhibitionist masturbation. In order to make a record of these issues for the Court, the Special Master sets forth his general findings below, separate from his findings about the adequacy of defendants' proposed remedial plan.

1. *Retaliation.* In her Objections to the Special Master's first draft report, Freitag raised concerns that the proposed policies submitted by defendants did not specifically address the issue of possible retaliation against staff who report such incidents (*see* Exhibit 2 at page 2).

An order prohibiting retaliation has been issued by the District Court (*see* Order filed August 18, 2003 on page 8). The Court's reference to the Special Master is limited to Freitag's *remaining* requests for equitable relief, which were denied without prejudice. Concerning these other requests, directed to inmate exhibitionist masturbation, the Court referred the case to the *Madrid* Special Master and the parties in *Madrid* to utilize their experience and expertise, and to consider the mental health component of the problem. Therefore, in the Special Master does not

believe that he has authority to respond to demands for more specific retaliation protections. Furthermore, amending anti-retaliation statements to correctional and health services policies may not be an effective or appropriate manner to institute an anti-retaliation policy. For these reasons the Special Master cannot, and he will not issue recommendations that relate to the issue of retaliation.

2. *The Scope of Protections Sought By Freitag.* No one should question the adverse impact of inmate exhibitionist masturbation. In her Opposition to the Special Master's first draft report, however, Freitag appears to take her demand for protection one step further.

Defendants propose a remedial plan which requires that all inmates who engage in exhibitionist conduct be placed in cells behind yellow lexan doors. The doors serve both as a warning to staff about the prisoner's propensities, and as a visual barrier that makes it difficult, if not impossible, for an inmate to expose himself. At page 5 of her Exhibit 2 Freitag requests "the use of visual devices to temporarily block or limit the ability of the inmate to observe the correctional officer in the control booth." For example, Freitag argues, prison officials at PBSP should cover the control booth windows with a reflecting screen that would render it impossible for an inmate (or anyone else) to see inside the control booth.

This proposal goes further than protecting staff from exhibitionist conduct – it precludes inmates from even looking at staff. The Special Master finds that this proposed remedy is excessive and will create unacceptable security hazards for staff and inmates.

To begin, it is essential that staff on the floor are able to see the control booth officer when they engage in such daily activities as entering a dayroom, when instructing inmates to approach or step away, when signaling for a door to be opened or closed, etc. Second, it is necessary, during many daily activities, for inmates to observe the control booth officer; for example, when responding to instructions concerning entering or exiting a dayroom. Third, the environment at Pelican Bay, especially in the Security Housing Unit, is stark and dehumanizing to a significant degree in its present configuration. The decision to further reduce human contact by cutting off all observation between inmate and staff may well have long term adverse consequences for the inmate population of the segregated living unit. Finally, while it is clear that staff, both corrections and health services, should be protected as much as possible from having to observe inmate sexual misconduct, it is not clear that staff have a right *to have inmates not be able to look at them*; indeed, one of the challenges that both correctional officer and the health care practitioners face is communicating effectively with individuals who have a history of anti-social behavior. For all of these reasons the Special Master rejects Freitag's request for visual barriers that preclude inmates from looking at staff.

3. *District Attorney Referrals.* In the initial proposed remedial plan, defendants took the position that they should refer all cases of criminal indecent exposure to the District Attorney of Del Norte County. Freitag expressed concern about this approach, arguing that the District Attorney should not be expected, and would not have the background, to sort through large numbers of referrals to determine which cases really needed to be prosecuted. All

parties agree, for example, that filing misdemeanor indecent exposure charges against an inmate with multiple life sentences would not be productive in terms of providing a deterrent to future exhibitionist masturbation. On the other hand, the filing of a felony indecent exposure charge against an inmate who has a relatively short release date should prove to be a deterrent. This practice will also serve to protect the public, by keeping a person who violates the Penal Code in prison. Likewise, because the California Penal Code provides for harsher felony periods of incarceration if an offender has a prior misdemeanor conviction, there may be some cases where the factors warrant the filing of misdemeanor indecent exposure charges.

The Special Master discussed this issue at length with the IERC during the February 2004 on-site inspection of the prison. He also discussed the issue of indecent exposure referrals with Mike Riese, the District Attorney of Del Norte County. Based on the information acquired from these discussions, the Special Master finds that the concerns expressed by Freitag have merit. Simply referring all cases to the district attorney is not adequately *managing* the problem of inmate exhibitionist masturbation. After discussion, defendants have agreed to modify their remedial plan in a manner that calls for the PBSP IERC to establish standards for referral, which will in turn lead to modifications in the PBSP MOU with the district attorney. In addition, the IERC will publish reports concerning referrals no less than semi-annually. The attached Pelican Bay State Prison Plan for the Management of Indecent Exposure Incidents has incorporated these new requirements.

4. *The Range of Available In-Prison Discipline Sanctions.* Defendants initial remedial plan proposal provided for punishing inmates convicted of an exhibitionist incident by subjecting them to credit and privilege losses, consistent with Title 15 of the California Code of Regulations. Freitag argued, at the meeting February 6, 2004, that defendants' plan was not adequate because in the reality faced by PBSP officers, the existing credit and privilege loss system was ineffective. After reviewing specific cases, and after discussion with the IERC, the Special Master finds that Freitag's concerns are well taken.

In effect, a proposal calling for the loss of privileges consistent with Title 15 means there can be almost no loss of privileges based on inmate exhibitionist masturbation. For example, PBSP officials are not allowed to even take away commissary privileges under Title 15 because the regulation precludes removing commissary unless the offense involves commissary itself or the misuse of State property. The Special Master finds that: (1) given the number of lifers involved with exhibitionist masturbation, and (2) the seriousness of exhibitionist masturbation, PBSP management requires every appropriate available discipline option to control this problem.

At the meeting of March 16, 2004, however, Director Jeanne Woodford proposed an appropriate solution to this issue. Ms. Woodford has approved a "Pilot Project" under Title 15 to address the issue of inmate exhibitionist masturbation at PBSP. The pilot will allow PBSP to consider the full range of appropriate correctional sanctions, subject to documentation, the preparation of appropriate policies, and notice to PBSP inmates. The attached Pelican Bay State Prison Plan for the Management of Indecent

Exposure Incidents has been modified to include the Pilot Project at page 2 under *Discipline Sanctions.*

5. *The Mental Health Assessment and Treatment Component of Defendants' Remedial Plan.* As noted in the Order filed August 18, 2003, one of the reasons the Court referred the inmate exhibitionist conduct portion of Freitag's requests for injunctive relief to the *Madrid* Special Master was because the parties in *Madrid* had been working on this issue, including the evaluation of a mental health component concerning the problem. After extensive consultation with Court expert Dr. Jeffrey L. Metzner, and numerous meetings among CDC personnel, defendants have submitted assessment and treatment plans, both of which are attached to this report.

It is important for the parameters of defendants' plan to be fully explained. All inmates who engage in exhibitionist masturbation will be *screened* by mental health personnel. Those who engage in repeated indecent exposure incidents, or who conduct themselves in a manner where staff believe a serious mental health problem to be present, will receive a more formal and comprehensive mental health *evaluation.* If a serious mental illness is diagnosed (e.g. one of ten mental illnesses set forth in the Mental Health Services Delivery System ("MHSDS")) and the inmate in not presently under treatment, the inmate will be included in the MHSDS. Situations may also arise where an inmate who is already enrolled in MHSDS will be diagnosed with a new disorder, or the additional presence of exhibitionist conduct will require modifications to the inmates' existing Treatment Plan.

Defendants' plan also includes procedures whereby inmates who engage in repeated incidents of indecent

exposure at PBSP will be evaluated for Exhibitionism (DSM diagnostic code 302.4). If Exhibitionism is subsequently diagnosed, and the inmate is not presently receiving treatment, he will be provided with treatment as set forth in the Mental Health Treatment Policy for Inmates Diagnosed With Exhibitionism Who Have Engaged in Indecent Exposure Incidents. The Exhibitionist related treatment will focus upon cognitive-behavior and relapse prevention therapy. The inmate will be included in the MHSDS under the "medical necessity" designation.

There was no evidence in either *Madrid* or *Freitag* that exhibitionism, absent a prisoner *acting out* in the correctional environment (e.g. engaging in indecent exposure and therefore being subjected to discipline and/or criminal sanctions) presented a serious problem for Pelican Bay State Prison inmates. Defendants have agreed to treat this disorder in the context of *Freitag* because Exhibitionist related treatment (curbing or controlling indecent exposure *at the prison*) is needed for an adequate and complete Title VII remedy. To clarify, the Special Master's insistence that defendants' remedial plan include treatment for those inmates who expose themselves to staff due to a mental illness (including Exhibitionism) should not be interpreted as a finding that some form of generalized sex offender treatment is mandated for Pelican Bay State Prison. Indeed, treatment for sex offenders has never been a component of the *Madrid* remedial plan.

6. *The Appropriate Lawsuit in Which to File Remedial Orders and to Monitor the Implementation of Defendants' Remedial Plan.* Counsel for defendants have proposed that monitoring proceed within the *Madrid* litigation rather than the *Freitag* case. Since the impact of the Court's injunctive order has systemic implications,

defendants argue, they are more suitable for monitoring by the *Madrid* team exclusively. After giving this issue careful consideration, the Special Master rejects defendants' proposal. The recommendations above relate to the protection of staff as well as to care of inmates. Counsel for Freitag litigated this case and are in the best position to keep the Special Master informed as to correctional officer concerns. The Special Master believes, at this point in time, that the remedial process and monitoring will benefit from the participation of both the *Freitag* and the *Madrid* attorneys, as ordered by the Court on August 18, 2003.

Defendants' also contend (see Exhibit 4 at page 2-3) that monitoring of the mental health portion of the remedial plan "is better suited for implementation in the context of the existing remedial plan in *Coleman v. Wilson,* 912 F.Supp. 1282 (E.D. Cal. 1995 or *Madrid v. Gomez,* 889 F. Supp. 1146 (N.D. Cal. 1995)." The Special Master again disagrees. *Madrid* and *Coleman* are limited to services mandated by the Eighth Amendment. Neither *Madrid* nor *Coleman* provide for treatment for sexual exhibitionism that creates a hostile Title VII environment. However, as pointed out above, defendants' proposed remedial plan considers Title VII requirements. This remedial plan is unique. It cannot be adequately monitored within the confines of class actions limited to the Eighth Amendment.

The Court's decision to refer this case to the *Madrid* team was the right decision. As defendants' concede "[c]ases involving issues of inmate rights and those involving employee rights often raise competing interests" (Exhibit 4 at page 3, lines 8-9). While tensions will almost certainly arise, in order to appropriately consider the rights of both inmates and staff, all aspects of monitoring

should take place within the context of both *Madrid* and *Freitag*. The Special Master agrees with proposal set forth by the *Madrid* plaintiffs (Exhibit 3 at page 4). He recommends that the Court's Order concerning this report bear the captions of both *Madrid* and *Freitag*.

7. *Notice to the Inmates of Pelican Bay State Prison.* Defendants' remedial plan calls for significant changes concerning prison official responses to incidents of inmate exhibitionist masturbation. Consistent with Title 15 requirements, the Special Master believes it appropriate to provide notice to Pelican Bay inmates of this change. In addition, prisoners should be afforded access to copies of the Order of August 18, 2003, this Report, and the Court's orders based on this report in the prison's law library. A recommendation for posting is set forth below.

IV.

SUMMARY OF DEFENDANTS' PROPOSED REMEDIAL PLAN

A. *Introduction.*

The PBSP remedial plan represents a significant change in thinking concerning exhibitionist inmates. Two points require emphasis.

First, the policies attached to this report may need to be modified as new issues arise or new problems surface. The Warden at PBSP should be afforded flexibility in making these changes, consistent with adequate review of the proposed changes by the Special Master and counsel. Changes to training manuals and other aspects of the plan, e.g. forms or the type of cell cover to be utilized,

should be made by the Warden in conjunction with notification to the Special Master and counsel.

Second, the management of sexually exhibitionist inmates presents serious security issues. For example, one element of the remedial plan involves the use of special cell door coverings for inmates with a history of exhibitionism. The purpose of the covering is to reduce the possible viewing by correctional and clinical staff of incidents of indecent exposure, and to identify for staff those inmates with an active history of such misconduct. The cell door covering, however, must also provide correctional officers and clinicians with adequate visual access to protect themselves when approaching the cell, when requiring the prisoner to "cuff-up," when distributing medications, and distributing meals. While it is essential that the PBSP remedial plan work in terms of reducing incidents of exhibitionism, it is equally important that security concerns are not compromised. Likewise, it is necessary, when implementing a program for cell door coverings, to ensure the cell door covering does not limit staff's legitimate observation of inmates in terms of safety checks, special watch procedures, etc. The balancing of these important considerations calls for the exercise of sound correctional judgment by the PBSP Warden and his staff. As explained above, the Special Master has deferred to that judgment concerning these types of questions. In the absence of correctional expertise to the contrary, he does not intend to disturb that discretion.

In making this determination the Special Master specifically rejects several of the recommendations set forth in July 11, 2000 report by the Office of the Inspector General ("OIG") (see the attachment to Exhibit 2) including a recommendation to place exhibitionist inmates into

areas of the prison where they cannot be viewed by staff, the use of "one-way mirrored film," and the covering the window to the exercise yard. On the other hand, the Special Master has also insured that several recommendations of the OIG are now in place at PBSP, including a psychiatric assessment, evaluation, and treatment program, managing referrals to the district attorney, making full use of the prison disciplinary process, and the creation of a comprehensive system to ensure that indecent exposure rule violations are tracked and managed. To provide the Court with a complete record, the CDC's September 2000 response to the OIG is attached as Exhibit 5.

B. *Overview of the Sexually Exhibitionist Inmate Remedial Plan.*

Defendants' "Pelican Bay State Prison Plan for the Management of Indecent Exposure Incidents" is attached as Exhibit 6. The policy sets forth numerous critical components of the plan to control and limit as much as possible incidents of inmate indecent exposure:

1. The *mandated* identification, reporting, tracking, and management of indecent exposure incidents (including the use of a new form allowing for employee comments about each incident);

2. The imposition of discipline to inmates who expose themselves; the use of indecent exposure reports (separate and distinct from the usual incident reports);

3. Mental health intervention (both the identification of mental health problems and their treatment);

4. The use of special security precautions including temporary yard restrictions, cell door coverings, and special jumpsuit;

5. A Correctional Peace Officers Standards and Training (CPOST) approved training plan for all correctional staff, specialized training for all mental health staff,

6. A committee of high ranking PBSP officials who will meet no less than four times per year to monitor the success of the remedial plan – the IERC.

The policy attached as Exhibit 6 is the heart of the defendants' program; however, to fully evaluate the scope of the program it is necessary to also assess the specifics. Exhibit 7 is the Required Reporting Employee Indecent Exposure Report. Exhibit 8 is defendants' "Procedure for Clinical Assessment of Inmate Indecent Exposure by the Mental Health Department," Exhibit 9 is the policy for "Mental Health Treatment for Inmates Diagnosed with Exhibitionism Who Have Engaged in Indecent Exposure Incidents." These policies, plus the attached lesson plan entitled "Management of Inmate Indecent Exposure" (Exhibit 10) comprise the essential documentation for defendants' proposed remedial plan. Exhibit 11 illustrates the yellow lexan door and the indecent exposure jump suit referenced in the new policies. SHU policies are attached as Exhibit 12, the currently Authorized Security Precautions and Restrictions attached as Exhibit 13, and the Behavior Modification Plan attached as Exhibit 14.

V.

FINDINGS RE ADEQUACY OF DEFENDANTS' REMEDIAL PLAN

Based on all of the meetings concerning sexually exhibitionist inmates in the context of both the *Madrid* and *Freitag* litigation, the discussions and document review mentioned above, as well as his discussions with the Court experts and PBSP staff, the Special Master finds as follows:

1. The "Pelican Bay State Prison Plan for the Management of Indecent Exposure Incidents" (Exhibit 6), the "Procedure for Clinical Assessment of Inmate Indecent Exposure by the Mental Health Department" (Exhibit 8), and the "Mental Health Treatment for Inmates Diagnosed with Exhibitionism Who Have Engaged in Indecent Exposure Incidents" (Exhibit 9) represent an adequate overall plan to address, manage, and limit as much as possible the problem of sexually exhibitionist inmates at PBSP.

2. The Required Reporting Employee Indecent Exposure Report attached as Exhibit 7 is a necessary and adequate element of the sexually exhibitionist inmate remedial plan. This form allows the staff exposed to indecent behavior to provide specific information about the incident outside the confines of the formal CDC incident reporting system. It also allows for recommendations and comments that would not be appropriate in a crime report and establishes a simple request format for employee support service assistance. In addition, the form provides the basis of a reporting system for tracking such incidents through the *Madrid* Unit.

3. PBSP has made a good effort to provide prompt, interim training concerning sexually exhibitionist inmates. An adequate final training program will, however, require CPOST approval, as well as review by the Special Master and counsel.

4. PBSP Behavior Management Plan Operation Procedure #224 has previously been approved by the Court. It remains an adequate policy today; however, it has not been utilized as often as needed. Concerning sexually exhibitionist inmates, defendants' plan must be effective *in practice*. Procedure #224 may be helpful toward producing more positive outcomes, especially when utilized in conjunction with an adequate mental health program requiring appropriate clinical intervention when inmate exhibitionist behavior is the result of paraphilia. If positive outcomes do not come about *in practice* through the use of Procedure #224 and an adequate mental health program, additional modifications of policies and procedures will be necessary.

5. The overall plan developed by defendants requires monitoring to ensure that it is effective in practice.

V.

RECOMMENDATIONS

The Special Master recommends as follows:

1. The Court should adopt defendants' "Pelican Bay State Prison Plan for the Management of Indecent Exposure Incidents" (Exhibit 6), the "Procedure for Clinical Assessment of Inmate Indecent Exposure by the Mental Health Department" (Exhibit 8), the "Mental Health Treatment for Inmates Diagnosed with Exhibitionism Who

Have Engaged in Indecent Exposure Incidents" (Exhibit 9) and the "Required Reporting Employee Indecent Exposure Report" (Exhibit 7) as the remedial plan for the management of sexually exhibitionist inmates.

2. Defendants should implement the plan immediately, including the implementation of a Title 15 inmate exhibitionist masturbation related "pilot project" at PBSP.

3. Defendants should submit to the Special Master, within 30 days, proposed policies and procedures (including but not limited to Pilot Project policies) relating to losses of privileges for indecent exposure, including but not limited to policies relating to time credit loss, loss of commissary, use of lexan doors (including the time periods for this restriction), and the use of indecent exposure jump suits. To the extent practical, the parties to this action and the *Madrid* case should be permitted to participate in this process.

4. Defendants should obtain CPOST certification for an adequate training program to be provided to all PBSP employees with regular contact with inmates, including nursing staff, in a timely fashion, consistent with their need to coordinate several elements of remedial plan implementation. The Court should order the Special Master to monitor defendants' progress obtaining CPOST certification and to work with PBSP officials to establish an adequate training schedule for such classes. To the extent practical, the parties to this action and the *Madrid* case should be permitted to participate in this process.

5. Defendants should submit to the Special Master, within 30 days, a proposed notice to the inmates of PBSP concerning the inmate exhibitionism remedial plan and its Title 15 pilot project components. To the extent practical,

the parties to this action and the *Madrid* case should be permitted to participate in this process. The Order of August 18, 2003, the Special Master's Report and Recommendations dated May 12, 2004, and the Court's Order concerning the Special Master's Findings and Recommendations should be made available to inmates in the prison law libraries within 30 days. The Warden of PBSP should review the exhibits to the Special Master's report and bring any security related concerns to his attention within 15 days. If agreement cannot be reached concerning the exclusion of exhibits for security based reasons, defendants may petition the Court for further relief.

6. The Court should order the Special Master to monitor the effectiveness, in practice, of defendants remedial plan as follows:

> A. Defendants should provide the Special Master with the minutes of each "IERC" meeting, and all reports utilized for discussion at the IERC; including but not limited to (1) the indecent exposure related 115 status reports from the Automated Disciplinary Management System, (2) the Mental Health Screen, Assessment, and Treatment computer report, (3) the IERC Review of Indecent Exposure Incidents, and (4) the incident reports prepared by staff that are summarized for the IERC summary report.
>
> B. The Special Master should meet and confer as necessary with the Warden of PBSP and all appropriate mental health clinicians to assess the effectiveness of the remedial plan. The Special Master should also travel on-site to PBSP to attend IERC meetings, observe training session, inspect housing units, and interview inmates

and/or staff as necessary to assess the effectiveness of the remedial plan.

7. The Court should provide for monitoring of the effectiveness, in practice, of defendants remedial plan by counsel for Freitag, counsel for the *Madrid* class, and the counsel for the defendants in *Freitag* and *Madrid* as follows:

A. Defendants should provide all counsel with the minutes of each "IERC" meeting, and all reports utilized for discussion at the IERC; including but not limited to (1) the indecent exposure related 115 status reports from the Automated Disciplinary Management System, (2) the Mental Health Screen, Assessment, and Treatment computer report, (3) the IERC Review of Indecent Exposure Incidents, and (4) the incident reports prepared by staff that are summarized for the IERC summary report. This document production should be subject to the provisions of the Stipulated Protective Order in this case.

B. Counsel and the Special Master will meet and confer with the IERC through video conference at the Office of the Attorney General once per quarter for the first year of monitoring, and twice per year thereafter, to discuss the status of the remedial plan as wells as specific cases and/or issues. In addition, if questions or problems arise between quarterly meetings, counsel for the parties may request information through the Office of the Special Master, similar to the manner in which remedial plan problems are addressed between "30-day" meetings at PBSP.

8. Defendants should not modify the "Pelican Bay State Prison Plan for the Management of Indecent

Exposure Incidents" (Exhibit 6), the "Procedure for Clinical Assessment of Inmate Indecent Exposure by the Mental Health Department" (Exhibit 8), the "Mental Health Treatment for Inmates Diagnosed with Exhibitionism Who Have Engaged in Indecent Exposure Incidents" (Exhibit 9) and the "Required Reporting Employee Indecent Exposure Report" (Exhibit 7) unless the modification is made pursuant to the following procedure:

> (a) defendants shall submit, with a copy to plaintiffs, a copy of the revised policy, document, etc., to the Special Master 14 days prior to its effective date. If there is a bona fide emergency, this time period may be reduced by an appropriate amount but in no event shall the revised policy, document, etc. be submitted to the Special Master later than its effective date.
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> (b) If the Special Master determines that the modifications(s) conflict with any of the Court's orders, he shall work with defendants to reconcile the conflict.
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> (c) If reconciliation is not possible, the Special Master shall file a report with the Court which sets forth his findings as to why defendants' modification(s) to the policy violate this Court's order(s). He shall also make recommendations as to what actions should be taken concerning the modifications.

Dated: May 12, 2004

/s/ John Hagar
John Hagar
Special Master

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEANNA L. FREITAG, Plaintiff, v. CALIFORNIA DEPARTMENT OF CORRECTIONS, et al., Defendants.	NO. C00-2278 TEH ORDER ADOPTING SPECIAL MASTER'S FINAL REPORT AND RECOMMENDATIONS RE: INMATE EXHIBITIONIST MASTURBATION (Filed Jul. 16, 2004)

Following a jury verdict finding that Defendant California Department of Corrections ("CDC") violated Plaintiff Deanna Freitag's rights under Title VII and that certain individual Defendants retaliated against Freitag in violation of 42 U.S.C. § 1983, this Court granted in part and denied in part Freitag's motion for injunctive relief on August 18, 2003. The Court granted the motion in part by enjoining officials at Pelican Bay State Prison ("PBSP") from committing further violations of Title VII. Aug. 18, 2003 Order at 8. The Court denied Freitag's remaining requests for equitable relief and found it prudent to refer the case to Special Master John Hagar and the *Madrid v. Gomez* team for "development of a remedial plan to address the problem of inmate exhibitionist masturbation" at PBSP. *Id.* at 9-10. On May 14, 2004, the Special Master filed his final report and recommendations on this issue. The CDC filed the only set of objections to this report.[1]

[1] The parties were given ten business days to file objections. Counsel for the CDC faxed objections to the Special Master on May 28, 2004, the last day of the ten-day period. The Court subsequently filed

(Continued on following page)

Having considered the Special Master's report, the CDC's objections, and oral arguments of counsel heard on July 12, 2004, the Court now issues this injunctive order as additional equitable relief to Plaintiff Freitag for Defendant CDC's violations of Title VII.

DISCUSSION

It is obvious from the Special Master's report that development of the remedial plan in this case has not been easy or straightforward. However, the end result appears to be a workable plan that has been narrowly designed to remedy the Title VII violations found in this case while, at the same time, protecting the inmate rights implicated by the plan. The Court has carefully reviewed the Special Master's final report and finds it to be well-reasoned and supported by the record. While the Court finds merit to a few of the CDC's objections, all of which are discussed in turn below, the Court finds good cause to adopt the vast majority of the Special Master's report and recommendations.

Scope of the Remedy

The CDC first objects to the scope of the Special Master's recommendations as extending beyond the Court's authority to remediate Title VII violations. However, as the Court explained when it granted in part and denied in part Freitag's motion for injunctive relief:

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these objections on June 7, 2004. For any future reports, counsel are hereby instructed that objections to final reports by the Special Master must be filed with the Court, and not merely faxed or otherwise delivered to the Special Master.

> Title VII bestows on district courts broad equitable powers to fashion remedial orders to redress the effects of past violations. *Bouman v. Block*, 940 F.2d 1211, 1233 (9th Cir. 1991); *see EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1578 (7th Cir. 1997) (explaining that Title VII grants district courts wide discretion to enjoin proven acts of employment discrimination).
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> . . .
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> Title VII is remedial legislation that should be liberally construed in favor of victims of unlawful employment practices. *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994); *see Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 721 (7th Cir. 1969) (noting that Title VII's grant of remedial authority should be interpreted broadly and applied in such a way that effectively eradicates the illegal conduct and makes the victim whole).

Aug. 18, 2003 Order at 2-4. To the extent that the CDC objects to the Court's authority to issue injunctive relief at all, the Court rejects this objection for the reasons stated in its earlier order. *Id.* at 4-6 (discussing Freitag's entitlement to injunctive relief). Similarly, the Court rejects the nonsensical suggestion by CDC's counsel at oral argument that the Court's remedial powers under Title VII are somehow diminished because "only" a statutory right, and not a constitutional right, is at stake.

The CDC also objects to the inclusion of a mental health component to the remedial plan, but the CDC's objections on this issue are unpersuasive. First, the Court rejects any assertion by the CDC that the proposed remedial plan would compromise the security of PBSP or the safety of its staff. In addition, it is undisputed that inmate exhibitionism contributed to the creation of the hostile

work environment at issue in this case, and it is equally undisputed that some inmates expose themselves because of mental illness. Thus, the Court agrees with the Special Master's conclusion that the problem of inmate exhibitionist masturbation, and therefore the Title VII violations found to exist at PBSP, "will not be solved, at least concerning some portion of the offenders, unless [the offenders] are screened (to determine if the exhibitionism is caused by a mental illness) and treated (to prevent or delay recidivism of future exhibitionism to staff)." Final Report at 9. Upon review of the proposed plan – which Defendants themselves developed in conjunction with Dr. Jeffrey Metzner, a Court-appointed expert – the Court further agrees with the Special Master that the proposed plan has been "carefully tailored to correct the Title VII problem that is at issue in this case, and not to do more." *Id.* at 10. As the Special Master observed, "Defendants have agreed to treat this disorder in the context of *Freitag* because Exhibitionist related treatment (curbing or controlling indecent exposure *at the prison*) is needed for an adequate and complete Title VII remedy." *Id.* at 16. By including mental health screening and treatment for exhibitionism as part of the remedial plan in this case, the Court does not hold that inmates have a right to such treatment under the Eighth Amendment. To the contrary, as carefully explained in the Special Master's report, such services are required to remedy the Title VII violations found by the jury in this case.

At oral argument, the CDC asserted that the goals of the proposed plan could be achieved by voluntary implementation. Thus, the CDC urged the Court to exclude the proposed plan from any injunctive relief ordered by the Court and instead engage in a period of "watchful waiting."

The Court soundly rejects this proposal. As the Court explained when it granted in part and denied in part Freitag's original motion for injunctive relief:

> [The] CDC has offered no evidence to suggest that it will effectively respond to the sexually hostile work environment created by inmate exhibitionist masturbation at Pelican Bay or that it will adequately address concerns employees have about the inmates' misconduct. CDC has, at every stage of this litigation, insisted that its actions do not constitute violations of Title VII, even going so far as to blame Plaintiff for the treatment she received. Under the circumstances, there is a distinct possibility that CDC's unlawful employment practices can and will persist. Accordingly, injunctive relief is needed to prohibit CDC from continuing to tolerate a sexually hostile work environment at Pelican Bay and to ensure that it no longer retaliates against officers who speak out against the illegality.

Aug. 18, 2003 Order at 7-8 (citations and footnote omitted). Although the CDC apparently asserts that it now has had a change of heart and is willing to implement a remedial plan voluntarily, the Court finds such representations to be too little, too late. Again, as this Court earlier explained:

> At this point, an admission of some degree of liability by CDC and a promise to comply with Title VII would be inadequate to preclude the entry of a remedial order, as "'protestations of repentance and reform timed to anticipate or blunt the force of a lawsuit offer insufficient assurance' that the practice sought to be enjoined will not be repeated."

Id. at 7-8 n.3 (citations omitted). The inadequacy of the CDC's "watchful waiting" proposal is further underscored by the Department's continuing protestations that it cannot control inmate behavior, and by its repeated argument that it should not be held liable because Freitag could have avoided the hostile work environment at PBSP if only she would have agreed to a transfer.

In short, given the Court's broad remedial powers under Title VII, its belief that an injunctive order is required to remedy the Title VII violations found by the jury, and its agreement with the Special Master that the proposed plan is necessary and has been narrowly tailored to remedy the Title VII violations, the Court rejects the CDC's objections to the scope of the proposed remedial plan. Assessment and treatment of inmates in the limited fashion discussed in the Special Master's report and accompanying exhibits is not only an appropriate part of the Court's injunctive relief, it is a necessary part without which the remedial plan cannot succeed.

Involvement of *Madrid* and *Freitag* Counsel in Monitoring Compliance

The CDC next "objects to the recommended involvement of Freitag's lawyers and *Madrid* counsel in the monitoring of the Department's implementation of any policies ordered by way of a remedial plan in *Freitag.*" CDC Objections at 4. This objection is unprecedented and unfounded. The CDC apparently believes that only its counsel, along with the Special Master, are entitled to participate in the monitoring of the remedial plan in this case. Such one-sided involvement of counsel would be improper.

As an initial matter, the CDC cites no precedent for barring a plaintiffs counsel from monitoring an injunction that remedies violation of that plaintiff's rights. Moreover, the CDC's arguments for doing so in this case are unpersuasive. First, the CDC has failed to convince the Court that the remedial plan will violate inmates' due process or privacy rights or the Health Insurance Portability and Accountability Act. Any individual mental health information that might be revealed to counsel in this case will be extremely minimal. The plan does not, for example, contemplate sharing inmates' mental health files or other detailed treatment information with counsel. Moreover, to the extent that any inmate mental health information is revealed, it will be covered by the stipulation and protective order entered by the Court on January 6, 2004. Given that all information produced by Defendants during the remedial process in this case is confidential and subject to the protective order, the Court does not find the potential inclusion of minimal information regarding inmate mental health to be grounds for excluding Freitag's counsel from the monitoring process.[2] If the protective order does not alleviate the CDC's concerns over inmate privacy, then the CDC is free to apply for a modification of the protective order, Protective Order at 3, or to meet and confer with counsel and the Special Master to seek a slight modification of the remedial plan so that, to the extent possible, individual inmate information would be redacted.

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[2] Notably, *Madrid* counsel, who competently represent PBSP inmates as a class and are responsible for safeguarding inmates' rights, have not objected to the participation of Freitag's lawyers in monitoring the remedial plan. This further persuades the Court that there is no serious risk that the plan will violate inmates' medical privacy rights.

The protective order also addresses the CDC's objection regarding use of information obtained during the remedial process by counsel for Freitag in the ongoing *Berndt* litigation. The protective order specifically provides that, "All confidential material shall be used solely in connection with the above-captioned action and not for any other purpose, *including other litigation,* without agreement of the parties and order of the Court." *Id.* (emphasis added). Thus, Freitag's counsel is barred by stipulation and court order from using any confidentially acquired information in the *Berndt* litigation either directly or indirectly.

Next, the CDC suggests that the CCPOA (California Correctional Peace Officers Association) would be better suited to monitor implementation of the remedial plan than Freitag's counsel. This Court disagrees. The CCPOA has done nothing to protect the rights of Deanna Freitag in this case; instead, Freitag relied on outside counsel to obtain a jury verdict finding the CDC liable for violation of her Title VII rights. Accordingly, the Court agrees with the Special Master that Freitag's counsel are in a better position to keep the Special Master informed of any correctional officer concerns (and, in particular, those of Plaintiff Freitag, the person for whom this injunction is being fashioned) regarding the implementation of the remedial plan. In response to the CDC's objection regarding the combined hourly billing rate of Ms. Price and Mr. Burris, the Court notes that counsel cannot recover for duplicative tasks; therefore, the CDC will not have to pay $950.00 per hour for any work done by Freitag's counsel.

The CDC also objects to the participation of *Madrid* counsel in this case because it contends that *Madrid* counsel has adequate opportunity to monitor the treatment of

inmates under the *Madrid* remedial plan. Again, the Court disagrees. The *Madrid* plan does not cover inmate exhibitionist masturbation, nor does it extend beyond inmates' Eighth Amendment rights. As the Special Master's report makes clear, the proposed remedial plan in this case does not stem from a finding that the Eighth Amendment requires generalized sex offender treatment, and monitoring this case only within the context of *Madrid* would therefore be insufficient. Nonetheless, the Court agrees that the participation of *Madrid* counsel in monitoring the remedial plan in this case is important. The plan involves both inmate rights and employee rights, and all parties agree that these rights may at times raise competing interests. Consequently, the Court finds it necessary to include counsel for both inmates and employees in the remedial process so that both sets of rights are adequately protected.

Finally, the CDC objects specifically to counsel's involvement in monitoring the CDC's efforts to obtain CPOST certification for its lesson plan for inmate indecent exposure and to establish a training schedule for related classes. This objection is unfounded. Counsel for the CDC argue that all monitoring by counsel should cease "once the training goal and program content have been established." CDC Objections at 5. However, establishing goals and program content are only initial steps in the remedial process. Regardless of whether or when the training program is certified by CPOST, the Special Master and counsel must continue to monitor the CDC's progress in implementing the remedial plan, as well as monitoring the effectiveness of that plan in practice.

Dual Captioning

The Court agrees with the CDC's objections regarding the dual captioning of this order with both the *Freitag* and *Madrid* captions. Although the Special Master recommended that the Court issue this order with both captions, he suggested that the Court should consider dual captioning very carefully given the different rights that each case is designed to protect. Having done so, the Court concludes that the better option is to file this order only under the *Freitag* caption, while at the same time ordering that the Clerk of the Court serve copies of this order on all counsel in *Madrid* so that they are aware of their right to participate in the monitoring process. Adopting this approach alleviates both the CDC's concerns regarding dual captioning and the *Madrid* plaintiffs' concern that they be allowed to participate in the remedial process.

Notice to Inmates

The CDC's final set of objections concerns the posting of information in the prison library, as recommended by the Special Master. However, in making its written objections, the CDC failed to consider the standard practices used in *Madrid*. Similarly, when specifically asked at oral argument why the Court should deviate from the *Madrid* practices in this case, counsel for the CDC completely sidestepped the issue and merely repeated, sometimes verbatim, its written objections. For the past nine years, all PBSP medical and mental health programs have been available in the prison library to inmates under *Madrid*. Similarly, the posting process in *Madrid* has not been restricted solely to orders by this Court; to the contrary, it has included, among other types of documents, drafts of the Special Master's reports, objections by counsel, use of

force procedures, and policies and practices relating to medical care. As the Special Master explained at the July 12, 2004 hearing, no security compromises or other problems have arisen from posting material in the prison library under *Madrid,* and none of the fears expressed in the CDC's objections has ever materialized. The Court is therefore unconvinced that the *Madrid* standard practices should be abandoned in this case.

Moreover, the remedial plan includes significant changes to the way in which PBSP staff and officials respond to incidents of inmate exhibitionist masturbation. As a result, the Court agrees with the Special Master that PBSP inmates should be notified of these changes, and that knowledge of the new range of sanctions may even assist prison officials in implementing the remedial plan. The Court further agrees that there is no legitimate purpose achieved by hiding the process by which this remedial order was developed – including the initial order in which this Court found it appropriate to refer the case to the Special Master and *Madrid* team and the Special Master's draft report and objections thereto.

However, the CDC has raised three objections with which the Court agrees. First, consistent with the *Madrid* practices, Exhibit 5 to the Special Master's final report should be redacted to exclude any inmate names. Second, pages 43-46 of Exhibit 12 should be excluded from posting. These pages of SHU Operational Procedure 222 have been marked as confidential from inmates, and the Court finds that legitimate security concerns warrant these pages' exclusion from posting in the prison library. Finally, the Court finds that legitimate security concerns also warrant redacting the "Security Housing Unit Emergency Response Team and Equipment Inventory" page from Exhibit 13.

There do not appear to be any legitimate security concerns to posting the other documents attached to the Special Master's report. Accordingly, subject to further review by the PBSP Warden and *Madrid* compliance unit in conjunction with the Special Master, all other exhibits to the Special Master's final report should be posted in full, along with a copy of the Special Master's report, this order, and the August 18, 2003 order establishing the reasons for implementing a remedial plan in this case.

CONCLUSION

In accordance with the above discussion, and with good cause appearing, IT IS HEREBY ORDERED that:

1. The Special Master's May 14, 2004 Final Report Re: Adequacy of Pelican Bay State Prison Remedial Plan Re: Inmate Exhibitionist Masturbation is adopted in full, except to the extent that it recommends that this order bear both the *Freitag* and *Madrid* captions and that all exhibits to the report be posted in the prison library without redaction.

2. This order will be filed only with the *Freitag* caption. However, counsel in *Madrid* shall be permitted to participate in monitoring the remedial plan in this case. To provide notice to the *Madrid* parties, the Clerk shall serve this order on all counsel in *Madrid*.

3. The Court hereby adopts Defendants' "Pelican Bay State Prison Plan for the Management of Indecent Exposure Incidents" (Exhibit 6 to the Special Master's final report), the "Required Reporting Employee Indecent Exposure Report" (Exhibit 7), the "Procedure for Clinical Assessment of Inmate Indecent Exposure by the Mental

Health Department" (Exhibit 8), and the "Mental Health Treatment for Inmates Diagnosed with Exhibitionism Who Have Engaged in Indecent Exposure Incidents" (Exhibit 9) as the remedial plan for the management of sexually exhibitionist inmates.

4. Defendants shall implement the plan immediately, including the implementation of a related Title 15 inmate exhibitionist masturbation pilot project at PBSP.

5. Defendants shall submit to the Special Master, within 30 calendar days of the date of this order, proposed policies and procedures, including but not limited to the Title 15 pilot project policies, relating to losses of privileges for indecent exposure, including but not limited to policies relating to time credit loss, loss of commissary, use of lexan doors (including the time periods for this restriction), and use of indecent exposure jump suits. To the extent practical, the parties to this action and the *Madrid* case shall be permitted to participate in this process.

6. Defendants shall obtain CPOST certification in a timely fashion for an adequate training program to be provided to all PBSP employees with regular contact with inmates, including nursing staff, consistent with their need to coordinate several elements of remedial plan implementation. The Special Master shall monitor Defendants' progress in obtaining CPOST certification and shall work with PBSP officials to establish an adequate training schedule for such classes. To the extent practical, the parties to this action and the *Madrid* case shall be permitted to participate in this process.

7. Defendants shall submit to the Special Master, within 30 calendar days of the date of this order, a proposed notice to the inmates of PBSP concerning the inmate

exhibitionism remedial plan and its Title 15 pilot project components. To the extent practical, the parties to this action and the *Madrid* case shall be permitted to participate in this process. This order, the Court's August 18, 2003 order, and the Special Master's Report and Recommendations filed on May 14, 2004, shall be made available in their entirety, except as noted in this order, to inmates in the prison law libraries within 30 calendar days of the date of this order. The Warden of PBSP and the *Madrid* compliance unit shall carefully review the exhibits to the Special Master's report and bring any security-related concerns to the Special Master's attention within 15 calendar days of the date of this order. If agreement cannot be reached concerning the exclusion of exhibits for security-based reasons, Defendants may petition the Court for further relief.

8. The Special Master shall monitor the effectiveness, in practice, of Defendants' remedial plan as follows:

(a) Defendants shall provide the Special Master with the minutes of each Indecent Exposure Review Committee ("IERC") meeting, and all reports utilized for discussion at the IERC, including but not limited to (1) the 115 status reports related to indecent exposure from the Automated Disciplinary Management System, (2) the Mental Health Screen, Assessment, and Treatment computer report, (3) the IERC Review of Indecent Exposure Incidents, and (4) the incident reports prepared by staff that are summarized for the IERC summary report.

(b) The Special Master shall meet and confer as necessary with the Warden of PBSP and all appropriate mental health clinicians to assess the effectiveness of the remedial plan. The Special Master shall also travel on-site

to PBSP to attend IERC meetings, observe training sessions, inspect housing units, and interview inmates and/or staff as necessary to assess the effectiveness of the remedial plan.

9. Counsel for Freitag, counsel for the *Madrid* class, and counsel for the defendants in *Freitag* and *Madrid* shall monitor the effectiveness, in practice, of the remedial plan as follows:

(a) Defendants should provide all counsel with the minutes of each IERC meeting, and all reports utilized for discussion at the IERC, including but not limited to (1) the 115 status reports related to indecent exposure from the Automated Disciplinary Management System, (2) the Mental Health Screen, Assessment, and Treatment computer report, (3) the IERC Review of Indecent Exposure Incidents, and (4) the incident reports prepared by staff that are summarized for the IERC summary report. This document production shall be subject to the provisions of the stipulated protective order in this case.

(b) Counsel and the Special Master shall meet and confer with the IERC through video conference at the Office of the Attorney General once per quarter for the first year of monitoring, and twice per year thereafter, to discuss the status of the remedial plan as well as specific cases and/or issues. In addition, if questions or problems arise between quarterly meetings, counsel for the parties may request information through the Office of the Special Master, similar to the manner in which remedial plan problems are addressed between "30-day" *Madrid* meetings at PBSP.

10. Defendants shall not modify the "Pelican Bay State Prison Plan for the Management of Indecent Exposure

Incidents" (Exhibit 6 to the Special Master's final report), the "Required Reporting Employee Indecent Exposure Report" (Exhibit 7), the "Procedure for Clinical Assessment of Inmate Indecent Exposure by the Mental Health Department" (Exhibit 8), or the "Mental Health Treatment for Inmates Diagnosed with Exhibitionism Who Have Engaged in Indecent Exposure Incidents" (Exhibit 9), unless the modification is made pursuant to the following procedure:

(a) Defendants shall submit a copy of the proposed revised policy or document to the Special Master, with a copy to Freitag's counsel and counsel for the *Madrid* class, at least 14 calendar days prior to the effective date of the proposed changes. If there is a bona fide emergency, this time period may be reduced by an appropriate amount, but in no event shall the revised policy or document be submitted to the Special Master later than its effective date.

(b) If the Special Master determines that the proposed modification conflicts with any of the Court's orders, he shall work with Defendants to reconcile the conflict.

(c) If reconciliation is not possible, the Special Master shall file a report with the Court that sets forth his findings as to why Defendants' proposed modification violates this Court's orders. He shall also make recommendations as to what actions should be taken concerning the proposed modification.

IT IS SO ORDERED.

DATED 7/15/04 /s/ Thelton E. Henderson
THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

(2)

No. 06-1085

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ROBERT J. AYERS, JR., *ET AL.*,

Petitioners,

v.

DEANNA FREITAG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did a correctly instructed jury, applying well-established Title VII law, properly find that (a) the plaintiff-respondent was subjected to a sexually hostile work environment and that (b) the defendant-petitioner failed in its duty to take prompt effective remedial action once it was on notice of the sexually hostile work environment?

TABLE OF CONTENTS

Page:

COUNTER STATEMENT OF THE QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

REGULATION INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION 14

I. THE DECISION BELOW IS FULLY CONSISTENT WITH DECISIONS OF THIS COURT 14

A. The Decision Below is Consistent With *Oncale* and *Clark County* and with *University of Pennsylvania v. EEOC* 14

B. The Decision Below Is Fully Consistent With Decisions Regarding Deference to Prison Administrators 18

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS ... 20

III. THIS CASE DOES NOT PRESENT AN ISSUE OF NATIONAL IMPORTANCE THAT NEEDS TO BE RESOLVED BY THIS COURT 22

CONCLUSION 24

TABLE OF CONTENTS

Page:

COUNTER STATEMENT OF THE QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

REGULATION INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION 14

I. THE DECISION BELOW IS FULLY CONSISTENT WITH DECISIONS OF THIS COURT 14

A. The Decision Below is Fully Consistent With This Court's Decisions in *Oncale* and *Clark County* and *University of Pennsylvania v. EEOC* 14

B. The Decision Below Is Fully Consistent With Decisions Regarding Deference to Prison Administrators 18

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS ... 20

III. THIS CASE DOES NOT PRESENT AN ISSUE OF NATIONAL IMPORTANCE THAT NEEDS TO BE RESOLVED BY THIS COURT 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases: *Page:*

Clark County School District v. Breeden,
532 U.S. 268 (2001) 14, 15

Crist v. Focus Homes, Inc., 122 F.3d 1107
(8th Cir. 1997) 19, 21

Dothard v. Rawlinson, 433 U.S. 321 (1977) 17, 18

Farragher v. Boca Raton, 524 U.S. 775 (1998) 22

Garcetti v. Ceballos, 547 U.S. ___, 126 S. Ct. 1951,
164 L. Ed. 2d 689 (2006) 3

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) ... 22

Oncale v. Sundowner Offshore Services, Inc.,
523 U.S. 75 (1998) 14, 15

Powell v. Morris, 37 F.Supp.2d 1011 (S.D. Ohio) 21

Robino v. Iranon, 145 F.3d 1109 (9th Cir. 1998) 18

Slayton v. Ohio Department of Youth Services,
206 F.3d 669 (6th Cir. 2000) 1, 19, 20, 21 23

University of Pennsylvania v. EEOC,
493 U.S. 182 (1990) 1, 14, 15, 16, 17

Statute:

Title VII of the Civil Rights Act of 1964, as amended by the

Page:

Equal Employment Opportunity Act of 1972 ..... *passim*

Regulation:

29 C.F.R. § 1604.11 ..... 2, 22

INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for a Writ of Certiorari to be granted. *See* Sup. Ct. R. 10. The decision of the Ninth Circuit is not in conflict with a decision of this Court. Indeed, Petitioners' contention, that state departments of correction are exempt from an important aspect of Title VII's prohibition against sexual harassment, conflicts with the decision of this Court in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990).

Further, the decision below does not conflict with decisions of any other Court of Appeals. To the contrary, as the Ninth Circuit demonstrates, its decision is in accord with every other Court of Appeals that has addressed the issue.

Finally, the petition does not present an unresolved issue of law that is of national importance or significance. Contrary to the assertions of petitioners, there are not a substantial number of cases in the lower federal courts involving sexual harassment of female correctional officers by prisoners and the failure of prison officials to take steps to protect their employees from such conduct. Rather, as noted recently by the Sixth Circuit, there have been only a few such cases,[1] the decisions of the lower courts with regard to the legal obligations of correctional departments as employers are consistent, and, as established by testimony considered by the jury in this case, other prison officials have taken appropriate steps to control inmate sexual behavior that would create a hostile working environment for their employees.

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[1] *Slayton v. Ohio Department of Youth Services*, 206 F.3d 669, 677-78 (6th Cir. 2000).

REGULATION INVOLVED

29 C.F.R. § 1604.11 provides in pertinent part:

Sexual harassment.

(a) Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

* * *

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will

> consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

[45 FR 74677, Nov. 10, 1980, as amended at 64 FR 58334, Oct. 29, 1999] [footnote omitted].

STATEMENT OF THE CASE

This is an action brought pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, by Respondent, a female correctional officer, against her employer, the California Department of Corrections.[2] Her essential claim was that she had been subjected to a hostile working environment because of sexual harassment by prisoners while she worked at the facility at Pelican Bay, that her employer knew of the harassment, and that it had failed to take appropriate corrective action.

The case was tried before a jury, and after a lengthy trial the jury, which had been instructed properly and in accord with established Title VII law, rendered a verdict in her favor.[3] The jury was given a special verdict form with the

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[2]In addition to other Title VII claims, respondent raised a claim that she had been retaliated against for exercising her rights under the First Amendment to the Constitution of the United States. That claim was remanded by the Court of Appeals to the District Court for further proceedings in light of this Court's intervening decision in *Garcetti v. Ceballos*, 547 U.S. ___, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). Appendix to the Petition for Writ of Certiorari (hereinafter, "App.") at 5, 32-33.

[3]The Petitioners did not challenge below the instructions given to the jury as they pertained to her Title VII sexual

following questions to which it gave the indicated answers:

> Did Plaintiff prove, by a preponderance of the evidence, that she was exposed to a sexually hostile work environment because of inmate conduct?
>
> Answer: Yes.
>
> Did Plaintiff prove, by a preponderance of the evidence, that Defendant California Department of Corrections knew or should have known that she was being subjected to inmate sexual misconduct?
>
> Answer: Yes
>
> Did Plaintiff prove, by a preponderance of the evidence, that Defendant California Department of Corrections failed to take prompt and effective remedial action reasonably calculated to curb or stop the inmate sexual misconduct once it knew or should have known that Plaintiff was being subjected to this inmate behavior?
>
> Answer: Yes.

Court of Appeals Excerpts of Record ("ER"), 2350-51.

The evidence presented at trial overwhelmingly supported the jury's verdict. Both Respondent and a number of other female correctional officers testified as to the deplorable conditions to which they were subjected. The main problem was that inmates engaged in public masturbation in front of female correctional officers. This

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harassment claims.

conduct was long-standing, having begun in the 1990's. Witnesses testified as to its pervasiveness, the impact the conduct had on their ability to perform their duties, and the failure of prison officials to take action in spite of being aware of the conditions.[4]

The constant and unchecked sexual harassment by the inmates caused stress and anxiety for female officers that interfered with their ability to perform their duties. Officer Mayo testified that the incidents degraded her, made her feel like the inmates were in control, and made her not want to do her job. She further testified that she started getting stomachaches and headaches, and on one occasion she had an anxiety or panic attack. She eventually came to the point that she would leave the unit in tears. SER 20; 28-29.

Officer Cruse testified that one inmate's conduct gave her nightmares. She stressed out and cried while she worked in the control booth. At one point she told a sergeant that she was quitting, saying, "I can't take this any more. And I was an emotional wreck." Officer Aguirre had to go to the doctor and "ended up on anti-depressants and sleeping pills because I couldn't sleep at night." Eventually, if she was scheduled to work in the yard she started calling in sick so that she did not have to work in that unit. SER 65; 95-96.

Respondent testified that the actions of the inmates and the resistance of the prison authorities against taking

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[4]The Court of Appeals summarized Respondent's evidence at App. 5-8. Record citations that follow are to the Supplementary Excerpts of Record ("SER") filed by Respondent in the Court of Appeals.

action made her physically unable to go to work.[5] She would throw up and she began using sick time. Subsequently, she sought help from her family physician, who referred her to a psychiatrist. SER 381; 411; 489.

Respondent and other female correctional officers complained on many occasions to their superiors of the inmate's behavior and its effects on them. Thus, female officers informed Pelican Bay officials of the exhibitionist behavior of the inmates and attempted to have them take action to control the offensive activities and, thereby, to ameliorate the hostile working environment the officers were subjected to. As early as 1995, Officer Fraser went to the Pelican Bay Equal Employment Opportunity officer and asked that the problem be addressed. The EEO officer took the position, in conformity with CDC policy, that inmate behavior was not an EEO issue, since only actions of co-workers were considered to give rise to sexual harassment claims. Therefore, no action was taken on Officer Fraser's attempted complaint. SER 959.

Officer Mayo reported inmate threats and misconduct to her supervisors, but "they were not receptive to my complaints . . . . I felt they didn't care. I felt they kind of weren't upset at all that I was having a bad time." Because her supervisors did not respond she then talked to prison managers, including Petitioners Schwartz and Ayers, the Associate Warden and Warden, respectively. She told them about the problems she was having with an inmate "and that

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[5]For example, Ms. Freitag testified regarding an occasion when an inmate in a shower room masturbated and yelled, "Oh God, I'm coming. I am up inside you Freitag." As he was yelling, other inmates joined in. Ms. Freitag testified that she felt "like I was being publicly raped." SER 300-01.

my supervisors were not providing me any support." However, nothing was done to offer her "any sort of protection" by CDC. SER 14; 15-17. In March of 1998 she filed an EEO complaint with the EEO officer, but it was dismissed. SER 33-35.

Other female officers complained to supervisory and administrative staff about the effect the inmate behavior had on them. Officer Aguirre testified that she used to document exhibitionist masturbation "all the time," but eventually gave up writing reports because "I felt nothing was being done or that there wasn't really anything being done." SER 92. Officer Cruse was told by her supervisor "You work in a male institution. You need to deal with the problem." SER 67.

A typical response was that "It's only sex" and should be expected in a facility for men. SER 304. Lieutenant David Carmichael, the supervisor of the Special Housing Unit, did not deny that he had responded to complaints about exhibitionist masturbatory behavior by saying, "What's the big deal" and that he had told women correctional officers "to just get over it, it's part of the job." SER 689

Respondent Freitag testified at length about her efforts to bring the harassment to the attention of Pelican Bay and CDC officials and to get them to take action. After a series of futile attempts to have her immediate superiors take action, she wrote to Petitioner Schwartz, one of the defendants, with a copy to the warden, Petitioner Ayers, another defendant, on April 7, 1999. The memorandum urged that action be taken to prosecute inmates for indecent exposure and stated:

> I should not have to feel raped every time [named inmates] decides to target me or any staff and for the supervisors' callous exchange of me and other female staff, as a sexual favor

> to gain [a named inmate]'s cooperation. . . . . I have not named specific supervisors. My object is to enforce the prosecution and conviction of repeat offenders, offering punitive action as a deterrent. Unless we can prosecute at least the extreme offenders, then every victim is a prostitute, treated like a prostitute, exchanging cooperation for sexual favors to alleviate paperwork and risk of injury for other staff and supervisors.

SER 328-31; 1263.

In addition to the testimony of the Respondent and her fellow correctional officers, she presented testimony from an expert in correctional matters and the report of the Petitioner's own Inspector General in support of her claim.

William Katsaris, plaintiff's expert on prison administration, first testified as to the deleterious effects of the failure to control the harassment engaged in by the inmates would have on the overall operation of the institution as it related to controlling inmate behavior. Asked whether the failure to address the complaints of officers that are offended effects the prison environment, Mr. Katsaris stated:

> Well, the inmates know a lot . . . . If, indeed they know they can get away with something and do, they simply work at it. . . . [W]here you have got someone you dislike and you believe that you have got some power or control or something that you can do that upsets them and nothing can be done about it or is done about it, then it changes the nature of the relationship. Well, in the institution, it changes the condition of employment. And if

> it's serious and pervasive and is unwelcome, then you have a hostile work environment .

SER 124.

Mr. Katsarsis further explained that the administration has a responsibility to both the inmates and the staff to control the behavior of the inmates since, "if the inmates know that nothing is being done about a particular issue, then the inmates start to run the institution." SER 125. In the case of Pelican Bay, the administration gave control away to the inmates. "They gave the inmate control. They empowered the inmate by simply doing nothing." SER 129.

Mr. Katsarsis testified in particular as to the three inmates who were responsible for most of the masturbation in the Security Housing Unit. He found that these inmates "started exhibitionist masturbating to irritate the women specifically." With inmates exhibiting such behavior, it was necessary "to start from day one to show them who is boss." SER 129. However, he testified,

> I found that they did not respond to the exhibitionist masturbation issue and primarily I believe that it was due to male supervisors not having the belief that it was a problem or if, indeed, they . . . did not have a paper trail on these individuals, it wouldn't look bad for the institution. . . . . My opinion is that due to the lack of intervention with this outburst of behavior that continued from 1991 almost unabated at the Security Housing Unit, created that environment, empowered the inmates and created a very hostile work environment for the females.
>
> It [the hostile work environment] was

> most severe and most pervasive. I have a listing of 101 women who were affected , and complaining is not the problem.

SER 130-31.

Mr. Katsaris testified that there were many actions that CDC officials could have taken to control the inmate's behavior but did not. For example, one of the prime offenders was not controlled despite masturbation being a pervasive action by him.

> What is he doing not restrained? What is he doing not on escort status? What is he doing having the capability to do that when since 1991 he has been that kind of problem. He should have been on escort status all the time.

SER 132.

Mr. Katsaris outlined a number of actions that could have been taken, including taking meaningful disciplinary actions; taking away yard privileges if an inmate masturbated in the yard; putting inmates in restraints while in the yard; covering an inmate's cell door window with a one-way opaque covering; covering the windows of the control room with a one-way mirrored finish so the inmates could not see when there is a female officer on duty; videotaping inmate behavior and using it during disciplinary proceedings; and working with the District Attorney to prosecute the most serious offenders for felony indecent behavior so as to increase their sentences. SER 135-44; 164-65.

Mr. Karsaris emphasized that none of these measures were expensive and that other institutions had instituted them. In fact, Pelican Bay was "the only institution I have come across that has a serious problem" with inmate

masturbation. SER 160. The Los Angeles County Jail, the maximum facilities in Colorado and Texas, and Federal institutions in Florence, Colorado, Marion, Illinois, and Atlanta, Georgia, used mirrored material. SER 195-96. Indeed, he "could go around the country where they use this mirrored material just so they [the inmates] can't see what they are doing." SER 144-45.

On cross-examination, Mr. Katsaris summed up his testimony by re-emphasizing the vital importance of controlling the inmates rather than having them control the situation. Disciplining them, prosecuting them, taking away yard privileges, requiring them to be shackled whenever they move "takes control completely away from the inmate. Does, indeed, restrict and control the inmate and to some degree punish them for their deed." SER 185-90.

In addition to the testimony of Mr. Katsaris, testimony from CDC personnel established that there had been a failure to take steps that could have ended the hostile working environment created by inmate behavior. In response to a letter Respondent Freitag wrote to a state legislator, the CDC Inspector General investigated the situation. Richard Ramsdell, who was in charge of the Inspector General's investigation, testified that the office had oversight of the Department of Corrections and had the ability to go in pursuant to California Penal Code § 6126 "and look at issues regarding how the practices of the prison, how things are managed or not managed and conduct investigations if needed." SER 417.

The state investigative team went to Pelican Bay and was provided documents regarding complaints made by female staff members regarding indecent exposure and masturbation by inmates. On the basis of the complaints and other assessments, the team decided to go ahead with the

investigation. The purpose of the investigation was to assess what management had done or not done regarding the complaints by female staff members. Further, the investigation would look into the disciplinary process for the inmates committing the acts and whether cases were being properly forwarded to the local district attorney's office for prosecution. SER 423-27.

The team for the Inspector General's office interviewed approximately forty-six persons as part of its investigation. The majority interviewed were employees, along with several inmates. The team also looked at documents, observed the physical layout of the security housing unit, took photographs, and met with the district attorney's office regarding prosecution of inmates for indecent exposure. The on-site investigation took place between November and December 1999. SER 429-30. Eventually, a report was prepared and presented to the Director of Corrections. SER 4531-64.

The investigators determined, first, that there were approximately twenty inmates who were subjecting female staff to lewd, vulgar language and exhibitionist masturbation. Further, the chief psychiatrist stated that "there is a cumulative effect of female correctional officers being repeatedly exposed to exhibitionist masturbation and could be stress and depression." The investigators found that:

> . . . [T]he supervisors and top administrative staff at Pelican Bay have not responded appropriately to complaints about inmates directing exhibitionist masturbation toward female staff members and have made little effort to take advantage of the options available to control this behavior.

SER 440-41.

The report made a number of recommendations as to what could be done, including moving problem inmates to cells with limited visual access to the control booth, covering the window on the door leading to the exercise yard so that inmates could not see whether a female officer was monitoring the yard surveillance camera, covering cells of problem inmates with one-way mirrored film, providing psychological counseling to problem inmates, making full use of prison disciplinary process, forwarding matters to the district attorney's office, and providing training for all existing correctional and supervisory staff on the effects on staff members and appropriate handling of exhibitionist masturbation behavior.[6] SER 446-48.

Based on this evidence, the jury rendered its verdict in favor of Respondent and the District Court issued injunctive relief requiring the CDC to develop a plan to control the behavior of the inmates. Subsequently, the plan was put into effect and CDC officials have claimed that the problem of inmate indecent exposure at Pelican Bay has largely been corrected.

The Court of Appeals, in a well-reasoned and comprehensive opinion, rejected the argument of the Petitioners that state correctional facilities are exempt from the requirement of Title VII that employers must take action to protect their employees Attorney at Law from sexual

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[6]The assertion in the Question Presented in the Petition for Writ of Certiorari that "guards are hired and trained to confront" prisoner's sexual misconduct is contradicted by the Inspector General's recommendation that correctional staff be trained as to appropriate handling of exhibitionist masturbation behavior.

harassment by third parties. The court affirmed the findings of the jury as fully supported by the evidence introduced at trial.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with decisions of this Court or any Court of Appeals. Nor does it raise an unresolved question of federal law that is of such importance that it warrants review. Rather, the case involves the correct application of established legal principles to the particular facts as found by the jury. Accordingly, petitioners have not demonstrated any compelling reason for the petition to be granted.

I.

THE DECISION BELOW IS FULLY CONSISTENT WITH DECISIONS OF THIS COURT.

A. The Decision Below is Consistent With *Oncale* and *Clark County* and with *University of Pennsylvania v. EEOC*

The facts in this case establish that the Respondent, and other female correctional officers, was subjected to the most egregious sexual harassment possible, short of actual rape. Inmates committed gross acts of criminal indecent behavior, including masturbation directed at them and with the specific intent of harassing them and interfering with their ability to perform their duties.

Petitioners totally failed in their obligation to take reasonable and effective action even to control the atrocious conduct of the inmates. The repeated complaints and requests of Respondent and her fellow officers were met with

callous indifference, inaction, and contempt. They were told to "get over it" because it was "only sex." The inevitable effect of the sexual conduct and the Petitioner's inaction in the face of it was to create a working environment so hostile and degrading as to make it virtually impossible for Respondent and other female correctional officers to carry out their duties.

Petitioners' argument that the decision below is inconsistent with this Court's decisions in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) and *Clark County School District v. Breeden*, 532 U.S. 268 (2001) and the other cases they cite, cannot be taken seriously. It is hard to imagine a set of facts that more clearly establishes "behavior . . . so objectively offensive as to alter the conditions of the victim's employment" (*Oncale*, 523 U.S. at 81) or sexual harassment "'so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment'" (*Clark County*, 532 U.S. at 270). To compare the single incident concerning a vulgar statement in a job statement involved in *Clark County* to the barrage of vile language and disgusting conduct to which Respondent was subjected to is absurd.

Petitioners claim that "The Ninth Circuit's decision eviscerates the application of *Oncale* and *Clark County* to prisons" (Petition at pp. 11-12). To the contrary, what they seek is the evisceration of Title VII's protection against sexual harassment as it applies to prisons. However, there is no basis in either the statute or policy to exempt prisons from this important protection for their employees. To do so would conflict with this Court's decision in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990)

In *University of Pennsylvania* this Court refused to allow a special privilege to academic institutions for peer

tenure reviews based on the special nature of university employment proceedings. The Court noted that in 1972, when Congress eliminated the exemption of institutions of higher education from Title VII (and when it also eliminated the exemption of state employers such as CDC), the

> extension of Title VII was Congress' considered response to the widespread and compelling problem of invidious discrimination in educational institutions. The House Report focused specifically on discrimination in higher education, including the lack of access for women and minorities to higher ranking (i. e., tenured) academic positions. See H. R. Rep. No. 92-238, pp. 19-20 (1971). *Significantly, opponents of the extension claimed that enforcement of Title VII would weaken institutions of higher education by interfering with decisions to hire and promote faculty members.* Petitioner therefore cannot seriously contend that Congress was oblivious to concerns of academic autonomy when it abandoned the exemption for educational institutions.
>
> The effect of the elimination of this exemption was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions.

493 U.S. at 190 (emphasis added; footnote omitted).

Hence, the Court held, unless Title VII specifically provides that a particular employer is subject to different rules of law than others, the statute will be applied uniformly. For,

"Congress has made the choice. If it dislikes the result, it of course may revise the statute." 493 U.S. at 194.

There is nothing in Title VII that even suggests that a state correctional department enjoys any special status. *See*, *Dothard v. Rawlinson*, 433 U.S. 321 (1977) where the Court applied the same standard that governed private employers for determining business necessity to height and weight requirement imposed by state prison authorities. In *Dothard*, the state contended that "the establishment of the minimum height and weight standards by statute requires that they be given greater deference than is typically given private employer-established job qualifications." 433 U.S. at 331-32, n. 14. The Court rejected the argument since in the legislative history of the 1972 amendments that extended Title VII to the states "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Ibid.*

To accept the arguments made by Petitioners would have precisely the result this Court warned against when it rejected the argument made in *University of Pennsylvania v. EEOC* for a special privilege rule for universities:

> Acceptance of petitioner's claim would also lead to a wave of similar privilege claims by other employers. . . . We perceive no limiting principle in petitioner's argument.

493 U.S. at 194. Similarly, here, if the Court accepted CDC's argument that it should be governed by different legal standards under Title VII because of the nature of its business, other employers in the public sector can make the same claim.

The issue raised by the facts of this case is whether Respondent is entitled to the same protection against pervasive, severe, and objectively offensive sexual

harassment as are all other employees who are protected by Title VII. The decision of the Ninth Circuit that she is so entitled does not conflict with any decisions of this Court.

B. The Decision Below Is Fully Consistent With Decisions Regarding Deference to Prison Administrators

Petitioners further argue that the decision below somehow conflicts with decisions of this Court holding that federal courts should defer to the discretion of prison administrators. There is no such conflict in the application of the standards of Title VII to protect prison personnel against sexual harassment by inmates.

To begin with, cases holding that Title VII's bona fide occupational qualification provision can permit prison officials not to assign female guards to male institutions, and vice versa, are inapplicable. The California Department of Corrections has decided to assign female guards to Pelican Bay and, once having done so, is not exempt from the requirement that it comply with Title VII regarding their working conditions. *See*, *Dothard v. Rawlinson*, 433 U.S. at 331-32, n. 14.

More importantly, the facts in this case did not involve a dispute as to whether measures taken by prison officials were, in their opinion, adequate or were all that could be done. For example, in the case of *Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998), cited by Petitioners, the Ninth Circuit held that the judgments of the prison officials were "entitled to substantial weight when they are the product of a reasoned decision-making process, based on available information and experience." 145 F.3d at 1110. In the present case, CDC did not present any evidence at trial of a reasoned decision-making process addressing the issue of sexual harassment by

inmates. To the contrary, the evidence established that the failure of CDC to control the inmate behavior had a devastating impact on the ability of female officers to do their jobs. Moreover, there was ample evidence that the failure of the CDC to take appropriate remedial steps was due more to the attitude of male supervisory personnel that the conduct of the prisoners was "no big deal" and should be expected, than to any "reasoned decision-making process."[7]

Thus, the evidence fully supports the jury's conclusion that the Petitioners failed to take "prompt and effective" action to correct the conditions.[8] In the present case there was a factual dispute as to whether the CDC and its agents had taken action that was either prompt or effective, and the evidence clearly supports the jury's conclusion that they had not.[9] Petitioners fail to note that the report of the CDC's own

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[7]The Inspector General's investigator testified that the prison's EEO officer told him that he believed that the inmates' actions were because the female officers were "a bunch of lesbians."

[8]The lower courts have consistently held that whether the action taken was "immediate and effective" is a question of fact to be determined, as in this case, by the jury. *See, e.g., Crist v. Focus Homes, Inc.*, 122 F.3d 1197, 1112 (8th Cir. 1997); *Slayton v. Ohio Department of Youth Services*, 206 F.3d 669 (6th Cir. 2000).

[9]The jury was instructed that "The defendants contend that they took all reasonable steps to reduce the frequency of SHU inmate masturbation," and that "Plaintiff must show that the California Department of Corrections' Responses to that environment were legally inadequate", that is, that the CDC "failed to take prompt, effective remedial action reasonably calculated to end the harassment." Further, if the CDC "identified prompt remedial action which was reasonably calculated to curb or stop

Inspector General found that the CDC had failed to act to control the inmate's behavior and provided numerous examples of actions CDC and the Pelican Bay officials could have taken consistent with good prison administration.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS

Despite Petitioners' suggestions to the contrary, the holding of the Ninth Circuit is fully consistent with decisions of other circuits. Thus, the lower court appropriately noted that prisons and similar institutions were different than other employers, and that the differences must be taken into account in deciding whether a correctional department is liable for prisoner misconduct. It discussed *Slayton v. Ohio Department of Youth Services*, 206 F.3d 669 (6th Cir. 2000), which held that prisoner conduct *without more* was not enough for liability, given the nature of the prison environment, but went on to hold:

> However, this general rule against prison liability for inmate conduct does not apply where the institution fails to take appropriate

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the inmate conduct" the jury "must find for the defendant." The trial court instructed that "whether the defendant's remedial action is reasonable and adequate depends upon the remedy's ability to curb or stop the sexually hostile inmate conduct from continuing and to discourage other potential inmate offenders from engaging in similar sexually hostile conduct." The court listed a number of factors for the jury to consider in determining whether any remedial action was "reasonably calculated" to prevent the sexually hostile conduct. ER 2312-18. The Petitioners did not object to these instructions or challenge them in the Court of Appeals.

> steps to remedy or prevent illegal inmate behavior.

206 F.3d at 677. Whether the institution had failed to take appropriate steps was a question of fact, not one of law. *Slayton* cited *Powell v. Morris*, 37 F.Supp.2d 1011 (S.D. Ohio), which similarly stated:

> Courts have repeatedly declined to impose sexual harassment liability upon correctional institutions for the sexually offensive conduct of inmates, *as long as the defendant institution took proper preventive and remedial steps with regard to inmate behavior.*

37 F.Supp.2d at 1017 (emphasis added).[10]

Similarly, in *Crist v. Focus Homes, Inc.*, 122 F.3d 1107 (8th Cir. 1997) the Eighth Circuit reversed a grant of summary judgment against the plaintiff, who was employed at a facility for mentally-incapacitated persons. The district court had held, in essence, that the facility was not liable as a matter of law because it could not control the patients. The court of appeals disagreed, holding:

> While we recognize that Focus Homes faced multiple obstacles in immediately preventing J.L. [the inmate] from acting out, including J.L.'s limited ability to understand or respond to directives and the regulatory framework

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[10]The actual holding of *Powell* was that there was insufficient evidence of sexual harassment since the plaintiff pointed to only one incident. The record, here, of course, presents a picture of pervasive and continual acts of sexual harassment.

> within which Focus Homes must operate, that does not end the inquiry. Focus Homes clearly controlled the environment in which J.L. resided, and it had the ability to alter those conditions to a substantial degree.

122 F.3d at 1111-1112. [1]

III.

THIS CASE DOES NOT PRESENT AN ISSUE OF NATIONAL IMPORTANCE THAT NEEDS TO BE RESOLVED BY THIS COURT

In 1980 the Equal Employment Opportunity Commission issued its guideline that employers may be held liable for the acts of non-employees where the employer "knows or should have know of the conduct and fails to take immediate and appropriate corrective action." 29 C.F.R. § 1604.11(e). *See, Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-66 (1986) (citing § 1604.11 as supporting the Court's interpretation of Title VII regarding sexual harassment); *Farragner v. Boca Raton*, 524 U.S. 775, 799-80 (1998) (citing with approval the similar standard in § 1604.11(d) for employer liability for co-worker conduct). And the lower federal courts have consistently applied the EEOC guideline in a variety of contexts.

Petitioners urge the Court that it should review the decision below "rather than wait for other circuit courts to

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[1] The Eighth Circuit further held that what could be done to control the patient's conduct was the subject of a conflict of opinion between the experts produced by the parties. Their testimony raised a *factual* dispute, so that an inquiry into the facts could not be foreclosed by ruling as a matter of law that there could not be liability. 122 F.3d at 1112.

consider the issue further." However, there is no basis to conclude that the question of the applicability of standard sexual harassment law to prison employees is either in doubt or of general importance. Other than the two cases in California and the handful of decisions in other circuits – all of which are consistent with each other – the issue has not been a matter of wide litigation. As the Sixth Circuit noted in *Slayton v. Ohio Department of Youth Services*: "there is scant appellate case law on this question." 206 F.3d at 677 (discussing the cases as of 2000).

The reason for the few cases raising the issue of sexual harassment by prisoners may lie in the fact that, as testified to by Respondent's expert, Pelican Bay was the only institution he had come across that had a serious problem with inmate masturbation, citing the Los Angeles County Jail, the maximum facilities in Colorado and Texas, and Federal institutions in Florence, Colorado, Marion, Illinois, and Atlanta, Georgia, as having dealt effectively with the problem.

The Petitioners failed in their duty to take appropriate steps to protect its employees at Pelican Bay from the egregious behavior of inmates. The decision of the Ninth Circuit is fully consistent with decisions of this Court, of every other circuit that has considered the issue, and with long-standing principles of Title VII law. There is no reason, let alone a compelling one, for this Court to review that decision.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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In The
Supreme Court of the United States

ROBERT J. AYERS, JR., et al.,

Petitioners,

v.

DEANNA FREITAG,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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TABLE OF CONTENTS

Page

I. The Ninth Circuit Decision Misapplied *Oncale* and *Clark County* to Prisons by Holding Them to the Same Standards as Ordinary Businesses and Ignoring the Reality of Their Inherently Dangerous Work Environments 2

II. The Ninth Circuit's Decision Compromises the Federal Courts' Traditional Deference to Prison Administrators on Prisoner Discipline and Safety, Under *Turner v. Safley* 5

TABLE OF AUTHORITIES

CASES

Clark County School District v. Breeden, 532 U.S. 268 (2001) ..... *passim*

Dothard v. Rawlinson, 433 U.S. 321 (1977) 1, 5, 7

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) ..... *passim*

Slayton v. Ohio Department of Youth Services, 206 F.3d 669 (6th Cir. 2000) 3, 4

Turner v. Safley, 482 U.S. 78 (1987) ..... *passim*

Vasquez v. County of Los Angeles, 349 F.3d 634 (9th Cir. 2003) 8

Williams v. General Motors Corp., 187 F.3d 553 (6th Cir. 1999) 7

STATUTES

42 U.S.C. § 2000e-2(a)(2) 8

REPLY BRIEF FOR THE PETITIONERS

The Ninth Circuit's decision in this case represents a dramatic departure from this Court's rules for analysis of Title VII hostile work environment claims. The lower court erroneously held that Title VII allows prison guards to maintain an action for a hostile work environment based on prisoner misconduct that the guards were hired and trained to confront. The Ninth Circuit's decision also departs from this Court's decisions, and circuit court decisions, which accord discretion to prison administrators over issues of inmate discipline and institutional safety and security. *Turner v. Safley*, 482 U.S. 78 (1987); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

Respondent asserts that there is no conflict between the lower court decision and this Court's decisions in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) and *Clark County School District v. Breeden*, 532 U.S. 268, 270 (2001), which instruct that the courts must evaluate alleged harassment in the social context in which it occurs to determine whether the harassment alters the terms and conditions of the victim's employment to create a hostile work environment. But respondent simply fails to address the crux of the issue: the Ninth Circuit failed to evaluate the prisoner's misbehavior in the context of the prison environment to determine whether the misconduct created a hostile work environment, as this Court requires.

Respondent also asserts that there is no conflict between the lower court decision and this Court's decisions, and circuit court decisions, which instruct that the courts

should defer to state prison administrators' judgment regarding matters of inmate discipline and institutional security in the Title VII context. Respondent suggests that, based on the facts of this case, the court need not have accorded such deference to the prison administrators' judgments regarding the proper penological response to the inmate misconduct. But again, the respondent fails to address the crux of the issue: the Ninth Circuit failed not only to accord deference to the prison administrators' judgment, but failed even to grapple with the *Turner* issue, notwithstanding the state's briefs squarely presenting it.

Because this case presents important issues regarding the proper application of Title VII in the prison context, and because the Ninth Circuit's decision has broad adverse impacts on the administration of the largest prison system in the country, review by this Court is warranted.

I. The Ninth Circuit Decision Misapplied *Oncale* and *Clark County* to Prisons by Holding Them to the Same Standards as Ordinary Businesses and Ignoring the Reality of Their Inherently Dangerous Work Environments.

This Court explained in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) and *Clark County School District v. Breeden*, 532 U.S. 268, 270 (2001), that courts must consider alleged sexual harassment in the social context in which it occurs and determine whether in that context the harassment is so objectively offensive that it *alters* the conditions of the victim's employment. *Oncale*, 523 U.S. at 82, 103. Respondent defends the Ninth Circuit decision, asserting that it is consistent with *Oncale* and *Clark County* because the prisoner misconduct to which

she and other female correctional officers were subjected was "the most egregious sexual harassment possible," and that "[i]t is hard to imagine a set of facts that more clearly establishes 'behavior . . . so objectively offensive as to alter the conditions of the victim's employment' (*Oncale*, 523 U.S. at 81) or sexual harassment 'so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment.' (*Clark County*, 532 U.S. at 270)." (Br. in Opp. 14-15.) Respondent repeats the analytical errors of the lower court. She, as did the Ninth Circuit, fails to evaluate the prisoners' conduct in the context of the working environment, or determine whether the misconduct was sufficiently severe as to alter the terms and conditions of a prison guard's employment. Certainly, considered in isolation and without context, the prisoners' misconduct is more egregious than that which occurred in *Clark County*. But this Court teaches that the misconduct must be evaluated in the social context in which it occurs to determine whether it alters the terms and conditions of the victim's employment and creates a hostile working environment which violates Title VII. The Ninth Circuit ignored these key requirements.

Referring to the Ninth Circuit's reliance upon *Slayton v. Ohio Department of Youth Services,* 206 F.3d 669 (6th Cir. 2000), respondent suggests that "the lower court appropriately noted that prisons and similar institutions were different than other employers, and that the differences must be taken into account in deciding whether a correctional department is liable for prisoner misconduct." (Br. in Opp. 20.) In dicta, the *Slayton* court said that prisons "cannot be held liable for a hostile environment created by prison inmates . . . ," but then suggested an exception where the prison "fails to take appropriate steps

to remedy" the inmates' behavior. But neither the *Slayton* court nor the Ninth Circuit in this case took into account the differences between prisons and other employers when evaluating whether the prison inmates' conduct created a hostile work environment. And, if the Sixth Circuit in *Slayton* and the Ninth Circuit here are suggesting that a prison can be liable for inmates' harassment solely because the prison fails to take appropriate steps to remedy the inmates' behavior, without deciding the threshold question whether the inmates' behavior creates a hostile work environment, then both circuit courts fundamentally conflict with this Court's decisions, and every other circuit courts' decisions, regarding the elements of a hostile work environment claim. All employers, prisons and ordinary businesses alike, may be liable under Title VII only if the plaintiff establishes both that he or she suffered a "hostile work environment" and that the employer failed to take steps to remedy that hostile environment. There is no employer liability merely because the employer fails to curb the misbehavior, without a determination that the misbehavior creates a "hostile working environment."

Respondent mis-characterizes the petition by suggesting that Petitioners claim a "special status" for prisons and "exemption" from Title VII, but that she "is entitled to the same protection against pervasive, severe, and objectively offensive sexual harassment as are all other employees who are protected by Title VII." (Br. in Opp. 15-18.) But Petitioners do not claim a "special status" nor seek an "exemption" from Title VII. A prison employer, as any employer, is entitled to the appropriate application of this Court's decisions in *Oncale* and *Clark County*. An employer may be liable under Title VII for a hostile work environment only if the alleged harassment, evaluated in

its social context, objectively alters the terms and conditions of the plaintiff's employment. Granted, it is difficult to imagine a set of facts involving prisoner misconduct directed at a prison guard, which the guard is hired and trained to confront, that, if evaluated in its social context, could alter the terms and conditions of the guard's employment and create a "hostile working environment." But that is not to say that Petitioners seek an exemption from Title VII, rather only the proper application of Title VII.

II. The Ninth Circuit's Decision Compromises the Federal Courts' Traditional Deference to Prison Administrators on Prisoner Discipline and Safety, Under *Turner v. Safley*.

1. Under *Turner*, courts generally defer to prison administrators' judgments regarding inmate discipline and institutional security. *Turner*, 482 U.S. at 89. Several circuit courts, following *Turner*, have deferred to prison administrators' judgments in Title VII actions by prison guards who claim that prisons discriminated when they hired only male or female guards. And this Court in *Dothard v. Rawlinson,* 433 U.S. 321 (1977) declined to invoke Title VII to impose measures to control inmates' antisocial behavior. Respondent asserts that there is no conflict between the lower court's decision and *Dothard* and *Turner* and its progeny because, she claims, prison administrators' judgments are entitled to deference only "when they are the product of a reasoned decision-making process, based on available information and experience" and in this case, they assert, "CDC did not present any evidence at trial of a reasoned decision-making process addressing the issue of sexual harassment." (Br. in Opp. 18.) Respondent is wrong.

Prison officials testified, for example, why it would be a dangerous security breach to cover control booth and cell windows with semi-opaque film. Covering control booth windows with film requires that the windows be closed, but windows must be kept open so guards can hear what is going on in the cell area and communicate with the inmates. If the guards cannot hear what is going on in the cell areas and communicate with the inmates, there would be a serious safety issue for staff and inmates. (RT 2248:4-2251:4.) Covering cell windows would be a dangerous security breach because, if the guards cannot not see the prisoner's hands, the inmate could attack the guard. (RT 2498:16-2501:3.) The prison officials presented substantial evidence of informed, reasoned decision-making, based upon their experience and a working knowledge of inmate discipline and institutional safety and security.

Although the prison officials' testimony demonstrated that the measures recommended by respondent's expert created safety and security concerns, and although the state explained the conflict with *Turner* in its briefs, the Ninth Circuit failed to grapple with the issue or even cite *Turner*. The Ninth Circuit's decision conflicts with *Turner* and its progeny because it not only failed to accord deference, it substituted its judgment for that of prison officials on issues of safety and prison discipline. In holding that the prison failed to take reasonable action to address the issue of inmate sexual misconduct, and thus liable under Title VII, the lower court concluded that the prison should have installed semi-opaque film on control towers and cells, despite prison officials' testimony that the semi-opaque film raised serious safety concerns. And it approved

injunctive relief against the prison, a court-imposed "remedial plan" requiring prison officials to modify prisoner discipline procedures and the prison facilities. The decision conflicts with *Turner* and *Dothard.*

2. Notwithstanding that the lower court's decision plainly conflicts with this Court's decisions in *Oncale* and *Clark County,* and *Turner* and *Dothard,* respondent asserts that "there is no basis to conclude that the question of the applicability of standard sexual harassment law to prison employees is either in doubt or of general importance." (Br. in Opp. 23.) She says that "the issue has not been a matter of wide litigation," perhaps because, as in the opinion of respondent's expert, "Pelican Bay was the only institution he had come across that had a serious problem with inmate masturbation. . . ." (*Id.*)

Respondent frames the issue presented by the Petition too narrowly. Under the Ninth Circuit's decision, Title VII supports a prison guard's action for sexual harassment against a state prison for any offensive behavior because of sex, not merely for exhibitionist masturbation or indecent exposure. Any offensive physical or verbal behavior because of sex, regardless whether it is "sexual" or not, would, in the Ninth Circuit's view, support a prison guard's hostile environment claim, with no consideration of the context of the misconduct or whether it alters the terms and conditions of the guard's employment.[1] In any event, respondent's claim that inmate exhibitionist masturbation is peculiar to Pelican Bay State Prison, where

[1] See *Williams v. General Motors Corp.*, 187 F.3d 553, 562-565 (6th Cir. 1999) and cases collected there [harassment need not be sexual to be "because of sex" and violate Title VII].

her claim arose, is belied by the filing of the putative class action against the California Department of Corrections and Rehabilitation by her counsel of record in *Berndt v. California Department of Corrections*, U.S.D.C., N.D., California, No. C03-3174 (N.D., filed July 9, 2003), alleging inmate sexual harassment based on exhibitionist masturbation at 29 California prisons.

Furthermore, the Ninth Circuit's decision would support a prison guard's action for harassment against a state prison for inmates' offensive behavior because of any of the protected bases under Title VII: race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(2); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003) [the elements to prove a hostile work environment are the same for both racial harassment and sexual harassment]. Respondent cannot seriously dispute that prisons are rife with offensive behavior by inmates, whether verbal or physical, whether directed at guards or other inmates, because of sex, race, color, religion, or national origin.

Respondent's attempt to minimize the importance of the issues presented in the petition by asserting that "the issue has not been a matter of wide litigation" is unpersuasive. The lower court's decision is the first decision in the nation to squarely hold that a prison guard can maintain a Title VII hostile environment claim against a prison based upon inmate misconduct which the guard has been hired and trained to confront. Given that the Ninth Circuit's decision impacts the nation's largest prison system, and the prison systems in the other eight states within the circuit, the Court should review this case now and clarify that Title VII does not make prisons liable for

requiring guards to perform their jobs, rather than wait until the issues are a "matter of wide litigation."

In the Ninth Circuit's view, Title VII supports a prison guard's action for harassment against a state prison based on an allegedly hostile work environment caused by prisoners' misconduct because of sex, race, color, religion, or national origin, notwithstanding that the guards are hired and trained to confront such prisoner misconduct. Under this decision, a prison guard can establish such a claim without the court considering the prisoners' misconduct in the context of the inherently hostile work environment of a prison, and without determining whether the misconduct alters the terms and conditions of the guard's employment, contrary to *Oncale* and *Clark County*. And, in the Ninth Circuit's view, Title VII can be used as a prison reform statute, empowering the court to impose its judgment on prisons regarding inmate discipline and institutional safety and security. It is important that this Court clarify that Title VII does not require prison officials to curb inmates' behavior at the expense of prison safety, nor does Title VII supercede the deference that courts grant to prison officials under *Turner*.

For the reasons above and in the petition for a writ of certiorari, the petition should be granted.

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Respectfully submitted,

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